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Supreme Court, U.S
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No. 10-909 JAN 11 2011

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In The

Supreme Court of the United States

GIANNA DRIVER,

Petitioner,

vs.

JAMES G. CONLEY, SR.,

Respondent.

On Petition For Writ Of Certiorari To The Texas Court Of Appeals

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Where there are undisputed facts of sexual abuse within a family home and the criminal defendant who committed the wrongs has a final criminal conviction of numerous years and now seeks to receive continued homestead protection from civil judgment enforcement on the very home where the criminal acts were perpetrated and concealed:

I. Whether state property rights, such as homestead exemptions, are subject to 14th Amendment due process and equal protection guarantees.[1]

II. Whether 14th Amendment due process and equal protection compels all courts within the United States, including state courts, to recognize equitable elements of estoppel, in order to preserve the integrity of the American judicial system.

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[1] This case may also have implications with regard to whether the 14th Amendment protects individuals, both men and women, from gender discrimination in cases of sexual assault

LIST OF PARTIES

1) GIANNA DRIVER, Defendant and Counter-Plaintiff and Petitioner;

2) JAMES G. CONLEY, SR., Plaintiff and Counter-Defendant and Respondent.

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OPINIONS BELOW

The opinion of the Texas Sixth Court of Appeals is published at 320 S.W.3d 516. Pet. App. 1.[1] The Texas Supreme Court subsequently denied Petition for Review.

JURISDICTION

Petitioner has asserted express federal questions at all levels of the Texas civil court system when she filed her post-judgment Motion for Turnover. Pet. App. 53, 55, 64. The highest court in the State in which a decision could be had was the Texas Sixth Court of Appeals, which was entered on August 11, 2010. Pet. App. 1. Petition for Review was denied by the Texas Supreme Court on November 12, 2010. Thus, the jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS, STATUTE AND POLICIES AT ISSUE

Fourteenth Amendment To The United States Constitution § 1

All persons born or naturalized in the United States and subject to the jurisdiction thereof, are

[1] All references to "Pet. App." are to the appendix filed by Petitioner.

citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Tex. Const. art. XVI, § 50

The homestead of a family, or of a single adult person, shall be, and is hereby protected from forced sale, for the payment of all debts . . .

Tex. Civ. Prac. & Rem. Code § 31.002(a)-(f)

(a) A judgment creditor is entitled to aid from a court of appropriate jurisdiction through injunction or other means in order to reach property to obtain satisfaction on the judgment if the judgment debtor owns property, including present or future rights to property, that:

(1) cannot readily be attached or levied on by ordinary legal process; and

(2) is not exempt from attachment, execution, or seizure for the satisfaction of liabilities.

(b) The court may:

(1) order the judgment debtor to turn over non-exempt property that is in the debtor's possession or is subject to the debtor's control, together with all documents or records related to the property, to a designated sheriff or constable for execution;

(2) otherwise apply the property to the satisfaction of the judgment; or

(3) appoint a receiver with the authority to take possession of the nonexempt property, sell it, and pay the proceeds to the judgment creditor to the extent required to satisfy the judgment.

(c) The court may enforce the order by contempt proceedings or by other appropriate means in the event of refusal or disobedience.

(d) The judgment creditor may move for the court's assistance under this section in the same proceeding in which the judgment is rendered or in an independent proceeding.

(e) The judgment creditor is entitled to recover reasonable costs, including attorney's fees.

(f) A court may not enter or enforce an order under this section that requires the turnover of the proceeds of, or the disbursement of, property exempt under any statute, including Section 42.0021, Property Code. This subsection does not apply to the enforcement of a child support obligation or a judgment for past due child support.

STATEMENT OF THE CASE

A. Facts Giving Rise To This Case

Although initially sued for alleged defamation and involuntarily forced into state trial court litigation,

Petitioner, Gianna Driver ("Driver") brought counter-claims based on sexual assaults and intentional infliction of emotional distress against Respondent, James G. Conley, Sr. ("Conley") to defend herself in the 71st Judicial District Court, Harrison County, Texas. In March of 2003, a jury verdict resulted in monetary damage awards, which were upheld on appeal. *Conley v. Driver*, 175 S.W.3d 882 (Tex. App. – Texarkana 2005, writ denied) (Reviewing trial record and stating that "Driver testified that the first physical contact which she regarded as inappropriate involved Conley coming up from behind her ***in the kitchen of their home***, hugging her, and rubbing her stomach; his hand gradually going "south" beneath her underwear. She also testified that Conley forced her to engage in sexual intercourse with him, [and] that it was very painful. . . .") (emphasis added).

B. State Trial Court Proceedings

Specifically, this proceeding pertains to a post-judgment motion for turnover order against a home and 5 lots, which was partially granted on 2 unimproved lots by Judge William T. Hughey in December of 2009. Although Driver asserted both 14th Amendment due process and equal protection rights and equitable estoppel under the "clean hands" doctrine, along with other state-law theories pertaining to "abandonment" of homestead, the trial court lacked guiding case law, which led to an unavoidable abuse of discretion by the court below in this case. In fact,

the presiding judge stated at the third turnover hearing on December 15, 2009:

> **I asked you for case law that would address the issue of whether or not the homestead exemption was lost if an individual is in prison, and hopefully, the Court of Appeals will let us know, based on this record when it goes there and everything, and in the future, you won't have to stand here, or any other attorney, and address that question, because the answer will be there.** Pet. App. 47.

C. The Appellate Court Proceedings

Driver was the appellant in the Texas Sixth Court of Appeals and Conley was the appellee, which affirmed the trial court's order of a partial grant of turnover. The court of appeals correctly stated the nature of the case as one involving a civil judgment for torts committed against Driver by Conley and that this proceeding is about an attempt to collect on the judgment by way of a turnover order sought on a home and 5 lots owned by Conley. *Driver v. Conley*, 320 S.W.3d 516 (Tex. App. – Texarkana August 11, 2010, writ denied). However, the court of appeals incorrectly stated that Driver's "unclean hands" argument through equitable estoppel had been raised "[f]or the first time on appeal." *Id.* at 520 (stating "For the first time on appeal, Driver contends Conley has 'unclean hands' "). Driver did in fact argue estoppel and unclean hands doctrine at the trial court

level, but the court simply did not know what to do with this case as is evidenced by the need for three separate and prolonged turnover hearings. Pet. App. 64 (pleading at Pet. App. 74 that "Conley has unclean hands with regard to any claim of exemption on [the properties]."); Pet. App. 46 (Stating at November 5, 2009 hearing "This Court should take into account Mr. Conley's unclean hands and his attempts to conceal his assets and acknowledge the equitable elements of estoppel"). The court of appeals also failed to address the federal questions pertaining to Driver's due process and equal protection rights under the 14th Amendment.

D. Texas Supreme Court Proceedings

On November 12, 2010, The Texas Supreme Court denied Driver's Petition for Review without a published decision, and this decision exhausted Driver's appeal on her state-law issues regarding "abandonment" of homestead. However, the Texas Supreme Court failed to address Driver's 14th Amendment due process and equal protection claims, as well as her plea to invoke the "clean hands" doctrine, although these were included in the petition filed with the Court.

REASONS WHY CERTIORARI SHOULD BE GRANTED

A. Introduction

The United States Supreme Court must review this extraordinary case because it involves a federal constitutional issue pertaining to the scope of state "property rights" where such rights start to infringe on 14th Amendment guarantees of due process and equal protection and begin to unreasonably undermine individual rights of victims of sexual assault. A constitutional issue such as the scope of homestead rights is of grave importance to the jurisprudence of the country. Additionally, this case involves a question on the application of property rights with regard to inmates; therefore, this case has important ramifications for both civil and criminal jurisprudence.[2] Furthermore, a large portion of the population, sexual assault victims, are affected by how state-property laws are administered.

Still further, this case is about the integrity of the judicial system in our country. Essentially, the case is about the equitable elements of estoppel and the "clean hands" doctrine as it is recognized in the United States. Gianna Driver's case is not about

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[2] Inmates lose constitutional rights all the time, including but not limited to freedom of movement and the right to vote. *Jones v North Carolina Prisoners' Labor Union, Inc* , 433 U S 119, 125, 53 L Ed. 2d 629, 97 S Ct. 2532 (1977) (Stating that "[t]he fact of confinement and the needs of the penal institution impose limitations on constitutional rights")

judicial activism or legislative policy, but rather about the application of facts to the rule of law. The state courts lack specific case law on point that addressed a criminal defendant's state property law rights when those rights violate established principles of equity and due process and unreasonably affect the federal constitutional rights of their victims.

B. Case Raises Important Federal Constitutional Questions Regarding How Far State Property Rights May Go

1. Background: State-Law Homestead

One of the great legal contributions that Texas has made to American jurisprudence is the concept of "homestead". Hon. H. Teichmueller, *The Homestead Law*, PROCEEDINGS OF THE TWELFTH ANNUAL SESSION OF THE TEXAS BAR ASSOCIATION, 63, 63 (July, 1893) ("Giving credit to Texas for the first homestead law" and referred to as "the great gift of the young republic to the world."). The Republic of Texas passed what would become the first homestead law in the United States. Act approved Jan. 26, 1839, 3d Cong., R.S., 1839 Republic of Texas Laws 125, 125-26, reprinted in 2 H.P.N. Gammel, Laws of Texas 125, 125-26 (1898); Paul Goodman, *The Emergence of Homestead Exemption in the United States: Accommodation and Resistance to the Market Revolution*, 80 THE J. OF AMERICAN HISTORY, 470, 470 (September, 1993) (stating that "Eighteen states passed homestead exemption laws between 1848 and 1852. The movement swept out of Texas in 1839 and spread

first to the lower South, then across the Midwest and Northeast, and finally into the new territories of the Far West.").

When the Republic of Texas became a state in 1845, the new state constitution included this important homestead right. Tex. Const. of 1845, art. VII, § 22. The formation of homestead was rooted in the mixture of influence of Spanish law and Anglo-Saxon law that was found in the former Republic of Texas aimed at protecting basic needs of individuals. Henry B. Gonzales, *Forum: The Texas Homestead: The Last Bulwark of Liberty*, 26 St. Mary's L. J. 339, 342 (1993) (stating that "Spanish . . . laws also gave greater protection to debtors by allowing them to prevent creditors from seizing the home, clothing, and tools a person needed to survive.").

The Texas Constitution contains very limited circumstances where a creditor may reach homestead property. Tex. Const. art. XVI, § 50. Nevertheless, the right is not absolute. So, for example, during the early formation of the common law pertaining to homestead, creditors were allowed to go after real property that no longer constituted a legitimate homestead. *King v. Harter*, 70 Tex. 579, 8 S.W. 308, 309 (1888) (Abandonment subjecting homestead property to seizure and sale must include a voluntary leaving or quitting of the residence); *see also, Gouhenant v. Cockrell*, 20 Tex. 96, 98 (1857) (stating that "True, a homestead may be disrobed of its guarantees, and the protection lost. The best evidence of

this is, that a new and permanent one has been acquired.").

2. Homestead Application Against Sexual Assault Victims Violates 14th Amendment – Preferences Given To Criminals In The Form Of Public Funds Used To Subsidize Post-Judgment Defense Of Assets

In this case, judicial discretion was used to justify the expenditure of public tax dollars to allow a criminal (with a final conviction) to be bench warranted back for a post-judgment turnover action pertaining to a "homestead," which is the very location where the acts of sexual abuse occurred. Pet. App. 50. Even assuming that a judge has "inherent powers" under the common law to enforce court orders, exercise of these powers must be reasonable and within constitutional limits. U.S. Const. amend. XIV, § 1. The State's actions of enforcing homestead, and in this case more egregiously by paying for transportation, room, and board for a criminal to the prejudice of Driver who is an *involuntary* judgment creditor, are a blatant violation of "due process."

Post-judgment defendants are not entitled to *attendance* at a turnover hearing because they have already had their day in court. *Sivley v. Sivley*, 972 S.W.2d 850, 859 (Tex. App. – Tyler 1998, no writ) (citing *Endicott-Johnson Corp. v. Encyclopedia Press*, 266 U.S. 285, 288-290 (1924) (" . . . the established rules of our system of jurisprudence do not require

that a defendant who has been granted an opportunity to be heard and has had his day in court, should, after a judgment has been rendered against him, have a further notice and hearing before supplemental proceedings are taken to reach his property . . . it is not essential that he be given notice before the issuance of an execution against his tangible property. . . .")).

3. Petitioner Was Denied Due Process And Equal Protection Under The 14th Amendment

The trial court in this case placed too much of an emphasis on the rights of the criminal and essentially chose a side by giving Conley preferences in the forms of: (1) transportation[3] and other costs paid for; and (2) finding "homestead" protection. The home at issue is the same home where Conley intentionally committed his criminal acts. *Conley v. Driver*, 175 S.W.3d 882 (Tex. App. – Texarkana 2005, writ denied). The public funds spent in furtherance of Conley's protection of property[4] against a valid civil judgment and the allowance of homestead protection in the "home" where a perpetrator has sexually abused a child

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[3] The presiding court improperly showed a great deal of sympathy for the defendant by issuing a bench warrant (Pet App 50), which essentially obligated the State to subsidize the transportation, room, and board costs in favor of a civil litigant.

[4] Property that Conley used to commit his criminal and civil wrongs against the victim

represents state action that is unconscionable and is an assault to the integrity of our judicial system. The use of public monies to the advantage of a criminal defendant[5] against a victim constitutes blatant due process and equal protection violations. U.S. Const. amend. XIV, § 1. By subsidizing Conley's post-judgment defense and by recognizing continuing homestead rights on these facts, Driver was greatly damaged in this case.

C. Federal Questions In This Case Are Important To Both Criminal And Civil Jurisprudence Of The States

1. Sexual Assault Cases Involve Both Criminal And Civil Violations Against Involuntary And Hesitant Victims

In this case, both civil and criminal juries found that Conley had sexually abused Driver. *Conley v. Driver*, 175 S.W.3d 882 (Tex. App. – Texarkana 2005, writ denied). Yet, statistically speaking, these results are the exception and not the general rule because sexual assault victims rarely want to come forward. Noel Bridget Busch, Ph.D., Holly Bell, Ph.D., Diana M. DiNitto, Ph.D., & Jeff A. Neff, Ph.D., *A Survey of*

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[5] *Price v Johnson*, 334 U S 266, 284-286 (1948) (stating that "Lawful incarceration brings about the necessary withdrawal or limitation of many privileges and rights Among those so limited is the otherwise unqualified right . to parties in all the courts of the United States to "plead and manage their own causes personally").

Texans: A Focus on Sexual Assault, INSTITUTE ON DOMESTIC VIOLENCE AND SEXUAL ASSAULT, THE UNIVERSITY OF TEXAS AT AUSTIN, 18 (2003) (indicating that a mere 18% of sexual assaults are *reported* to authorities in Texas). Failure of courts, as institutions of society, to acknowledge the profound difficulty of making both criminal and civil redress viable for sexual assault victims results in a chilling effect on holding violators accountable. As sexual assault issues are a growing societal problem, it is necessary for there to be direction and consistency in the law. Otherwise, trial courts are left with scant guiding principles when it comes to the civil case.

For example, the trial court here proceeded to issue a post-judgment bench warrant in the civil case based on "due process" concerns. Pet. App. 50. The trial court expressed concerns regarding "due process" and "notice" when it chose to adjourn the September 9, 2009 turnover hearing brought by Driver.[6] Pet. App. 31 (presiding judge stating "let's work on bench warranting him back, and then we'll

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[6] The trial court's actions subjected Driver to being cross-examined, *yet again*, by her former abuser Although Driver was a minor when the torts occurred, her name was placed in the public record by the filing of a civil defamation suit against her – another example of manipulation targeted to silence the victim The U S. Supreme Court must realize the importance addressing how the courts should properly deal with the civil sexual assault case, especially where it is undisputed that there is a final criminal conviction

set it and everything . . . he's going to spring into action, and then lo and behold, we'll be back in here on some type of rehearing, basically, you know, going back to square one *with him probably raising some issues as to due process and notice* and everything.") (emphasis added). When the trial court placed importance on Conley's "due process" rights and determined it was necessary to allow him to be physically present, it committed clear error because due process only requires *access* to the courts and not that the State provide funds to have incarcerated individuals *physically present* at civil claims that they brought upon themselves and already litigated.[7]

2. Criminals Are Allowed To Benefit From State Homestead Laws While Having No Legitimate "Homestead" Use

Given the evidence[8] of his age, marital status, current status of having no minor children and none expected, his life expectancy,[9] the remaining length of 29 years on his sentence, and the misuse of the home

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[7] In this case, Conley litigated the civil claim he initiated against an involuntary litigant all the way to the Texas Supreme Court *Conley v Driver*, 05-1037, March 3, 2006, writ denied (Tex 2006)

[8] Conley testified that he is already 74 years of age (Pet. App 35), that he is divorced (Pet. App 42), that he has no minor children (Pet. App 36), that he has 29 years left on his sentence (Pet App 39), and that his father only lived to be 87 years of age (Pet App. 37)

[9] *See* FN 8, *supra*

as an instrument to sexually abuse Driver, Conley no longer has any legitimate homestead use but may continue to receive the benefit of state homestead protection[10] under the current legal environment in Texas.

Of course, a criminal will claim that he "intends" to return to this home when he is "exonerated."[11] Nevertheless, Conley has been in prison for six years already (Pet. App. 36), and he has exhausted his criminal appeals. (Pet. App. 40). This is a key fact – Conley lied about his innocence and was found guilty. Allowing continued property protections in civil cases after final criminal conviction undermines both the civil and criminal legal systems and sends the message that the consequences of committing sexual assault are not so bad after all. The right of sexual assault victims to seek justice in the civil system is severely limited under current legal conditions.

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[10] Conley's long term residency in prison means that he no longer needs real property to have his physical needs for living met

[11] "Intention *in good faith* to occupy the premises is the prime factor in establishing the homestead status of property. . ." *Lifemark Corp v Merritt, et al*, 655 S W 2d 310, 316 (Tex App – Houston [14th Dist] 1983, writ ref'd n r e) (emphasis added)

D. Large Segment Of Population, Sexual Assault Victims, Are Affected By How States Administer State-Law Property Rights

The most common place that victims of sexual crimes are assaulted is in their own home. Noel Bridget Busch, Ph.D., Holly Bell, Ph.D., Diana M. DiNitto, Ph.D., & Jeff A. Neff, Ph.D., *A Survey of Texans: A Focus on Sexual Assault*, INSTITUTE ON DOMESTIC VIOLENCE AND SEXUAL ASSAULT, THE UNIVERSITY OF TEXAS AT AUSTIN, 19 (2003). In cases like these, the sexual abuse is often hidden in the home. A primary reason that children are removed from their homes is due to sexual and physical violence,[12] yet as recently as 1975, psychiatric texts incorrectly indicated that childhood sexual assault occurred in only one family in a million.[13] Courts must not recognize homestead rights where the home was used as an instrument of abuse at the criminal's own choosing. Otherwise, there will be a further chilling effect on hesitant victims who are too embarrassed to seek out assistance. The correct response to preserve the integrity of the court system is to recognize *the possibility* that homestead rights are not absolute and subject to 14th Amendment due

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[12] Catherine Itzin, *Incest, Paedophilia, Pornography and Prostitution: Making Familial Males More Visible as the Abusers*, CHILD ABUSE REVIEW, 35, 45 (Jan /Feb 2001)

[13] Alfie Kohn, *Shattered Innocence Childhood Sexual Abuse is Yielding its Dark Secrets to the Cold Light of Research*, PSYCHOLOGY TODAY, 54, 54 (February 1, 1987).

process and equal protection guarantees for the victim and that the equitable doctrine of "clean hands" may be invoked on a case-by-case basis where there is a final conviction for criminal acts that led to long-term incarceration and loss of legitimate homestead uses.

E. The Integrity Of The United States Judicial System And The Integrity Of Each State Judicial System Is At Stake

1. "Clean Hands" Doctrine Compels Clarification Of Homestead Application

The benefits of legal protections must be preserved with the rule of law. The "clean hands" doctrine prevents a wrongdoer from obtaining relief and benefitting from his own misconduct. *Kostelnik v. Roberts*, 680 S.W.2d 532, 536 (Tex. App. – Corpus Christi 1984, writ ref'd n.r.e.) (citing *Hand v. State*, 335 S.W.2d 410, 419 (Tex. Civ. App. – Houston 1960, writ ref'd n.r.e.) and stating that "it is a matter within the sound discretion of the trial court to determine whether [a party] has come into court with clean hands and whether the alleged fraudulent actions were such as to deny [that party] relief."). Based on Conley's criminal acts and fraudulent actions, he has acted with unclean hands and should be estopped from claiming homestead. It is unconscionable for a party to claim the benefit of homestead while using the very home at issue to commit sexual assaults. The purpose of homestead was to

provide for basic needs[14] – not to allow sexual crimes in the home.

In 1945, the U.S. Supreme Court recognized the "clean hands" doctrine and indicated that this equitable notion takes on added importance when the case takes on an issue of importance to the public interest. *Precision Instrument Mfg. Co. v. Automotive Maintenance Machinery Co.*, 324 U.S. 806, 815, 89 L. Ed. 1381, 1386-1387, 65 S. Ct. 993, 998 (1945). In this case, you have a young woman who is strong enough to endure the hardships of the current legal climate only because she understands that her case may be able to help others in the future – the public interest is no doubt a part of this case.

2. "Clean Hands" Doctrine May Be Invoked Under Estoppel

Although the "clean hands" doctrine is generally considered to be an equitable concept, it is possible for a party to invoke estoppel and raise the issue of unclean hands to prevent an injustice. *Steubner Realty 19, Ltd. v. Cravens Rd. 88, Ltd.*, 817 S.W.2d

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[14] The underlying idea behind "homestead" was to provide basic needs for the individual and his family Henry B Gonzales, *Forum· The Texas Homestead. The Last Bulwark of Liberty*, 26 St. Mary's L J 339, 342 (1993) (stating that "Spanish and Mexican laws also gave greater protection to debtors by allowing them to prevent creditors from seizing the home, clothing, and tools a person needed to survive ").

160, 165 (Tex. App – Houston [14th District] 1991, no writ). As stated by the *Steubner Court:*

> **Although these cases hold that a party may not raise the "unclean hands" doctrine in a common law or statutory action, they are inapplicable to cases involving common law actions where a party has raised the defense of estoppel.**

Additionally, unclean acts are knowing and willful when state criminal law has been violated, which compels application of the "clean hands" doctrine. *See Shirvanian v. Defrates*, No. 14-02-00447-CV, 2004 Tex. App. LEXIS 182, at 41-44 (Tex. App. – Houston [14th Dist.] Jan. 8, 2004, writ denied) (citing *Ward v. Emmett*, 37 S.W.3d 500, 503 (Tex. App. – San Antonio 2001, no writ)), *withdrawn, rev'd on other grounds,* 161 S.W.3d 102 (Tex. App. – Houston [14th Dist.] 2004, writ denied). Here, Conley committed crimes, and such unclean acts are damaging Driver further if the courts fail to apply estoppel to Conley's claim of "homestead."

The equitable elements of estoppel give courts power to prevent harm to victims and to promote justice and judicial integrity. "Clean hands" doctrine prevents a wrongdoer from committing misconduct while seeking the aid of the courts in order to endorse reprehensible acts. In order to protect the integrity of the courts, there can be no other conclusion but that Conley has "unclean hands" with regard to "homestead."

CONCLUSION

The courts below have been confronted with a unique set of facts and a novel question of law pertaining to the parameters of state-law homestead in light of victims' federal constitutional rights. Specifically, whether someone who intentionally commits criminal acts of sexual assault within a home may be entitled to claim continuing homestead protection? The criminal acts committed by James G. Conley, Sr. indicate intentional conduct with a disregard to the usual consequences of imprisonment; therefore, he must be deemed to have "unclean hands" and the State must be ordered to properly balance the rights of sexual assault victims when property rights begin to shield real property that was used in the commission of crimes.

A lack of case law on point addressing loss of homestead by intentional criminal acts has further damaged the victim in this case by protecting property that would provide just compensation on the civil judgment. Additionally, the courts must preserve the integrity of the judicial system by allowing victims to invoke the equitable elements of estoppel and the "clean hands" doctrine on a case-by-case basis to prohibit criminal defendants from claiming protection of the law in the very home where sexual assaults occurred. Finally, the application of homestead rights for the benefit of criminals to the unreasonable detriment of sexual abuse victims violates both due process and equal protection clauses of the 14th Amendment to the United States Constitution.

Should this case be decided against Gianna Driver, the Court will send the wrong message to abusers.

PRAYER FOR RELIEF

WHEREFORE, PREMISES CONSIDERED, Petitioner, Gianna Driver requests that this Court grant certiorari in this case and vacate the Texas Sixth Court of Appeals Judgment as well as overrule the denial of her application for turnover of the homestead properties owned by James G. Conley, Sr. in the presiding court below, or alternatively, remand the matter for further proceedings to correct errors, and for such other and further relief, either at law or in equity, to which Gianna Driver may show just entitlement.

Respectfully submitted,

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Counsel for Petitioner

GIANNA DRIVER, Appellant
v.
JAMES G. CONLEY, SR., Appellee

No. 06-10-00004-CV

COURT OF APPEALS OF TEXAS, SIXTH DISTRICT, TEXARKANA

320 S.W.3d 516; 2010 Tex. App. LEXIS 6580

July 27, 2010, Submitted
August 11, 2010, Decided

COUNSEL: Hon. Stan O. Springerley, Attorney at Law, Longview, TX.

James G. Conley Sr., Huntsville, TX.

JUDGES: Before Morriss, C.J., Carter and Moseley, JJ. Opinion by Chief Justice Morriss.

OPINION BY: Josh R. Morriss, III

OPINION

James G. Conley, Sr., has previously been convicted of, and is serving time for, sexual assaults against Gianna Driver.[1] For those torts, Driver obtained a civil money judgment against Conley. As part

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[1] Conley was convicted of two counts of aggravated sexual assault, three counts of sexual assault, and four counts of indecency with a child. He was sentenced to thirty-five years' incarceration on both counts of aggravated sexual assault and twenty years' incarceration on all remaining counts, all to be served concurrently

of Driver's efforts to collect that judgment, she appeals from the denial of her request for a turnover order[2] on a house and lot that Conley claims as his homestead. Driver argues that "someone who intentionally commits criminal acts of sexual assault within a home against a minor child may [not] be entitled to claim continuing homestead exemption" since "imprisonment in a new residence" should be deemed abandonment of homestead. Because we hold that Conley's imprisonment for his crimes does not constitute abandonment of his homestead, we affirm the trial court's denial of Driver's request for a turnover order concerning the house and lot in question.[3]

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[2] To try to collect on the judgment, Driver filed with the trial court a motion for turnover order asking the court to order Conley to turn over his home and lot along with other unimproved lots, all in Harrison County. While the trial court ordered turnover of the unimproved lots, it agreed with Conley that the property containing his home remained his homestead.

[3] Driver also claims that Conley was improperly benched warranted to allow for his presence at the turnover hearing. We do not address the merits of that claim because that issue was waived. "As a prerequisite to presenting a complaint for appellate review, the record must show that" a "complaint was made to the trial court by a timely request, objection, or motion." TEX. R. APP. P. 33.1. "A 'timely' objection is one interposed at a point in the proceedings which gives the trial court the opportunity to cure any alleged error." *Solomon v. Steitler*, 312 S.W.3d 46, 58 (Tex. App. – Texarkana 2010, no pet.). Moreover, "a party will not be allowed to complain on appeal of an action or ruling which she invited or induced." *Boufaissal v. Boufaissal*, 251 S.W.3d 160, 162 (Tex. App. – Dallas 2008, no pet.).

At an earlier attempted hearing on the turnover motion, the question of notice to Conley was addressed. After a short

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"Homestead rights have historically enjoyed great protection in our jurisprudence." *Florey v. Estate of McConnell*, 212 S.W.3d 439, 443 (Tex. App. – Austin 2006, pet. denied) (prisoner who murdered his wife was entitled to claim homestead exemption). Our Texas Constitution provides that "[t]he homestead of . . . a single adult person, shall be, and is hereby protected from forced sale, for the payment of all debts" not specifically enumerated within. TEX. CONST. art. XVI, § 50. Homestead rights are liberally construed to prevent citizens from losing their homes. *Florey*, 212 S.W.3d at 443. The party seeking a turnover order must prove that the property is not exempt. *Hanif v. Clarksville Oil & Gas Co.*, No. 06-09-00110-CV, 2010 Tex. App. LEXIS 3976, 2010 WL 2105936, at *3 (Tex. App. – Texarkana May 27, 2010, no pet.) (mem. op.); *see* TEX. CIV. PRAC. & REM. CODE ANN. § 31.002(a)(2), (b)(1) (Vernon 2008);

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discussion, the trial court suggested, "[L]et's see whether or not we can bench warrant [Conley] back" for the hearing Driver's counsel replied, "Okay That would certainly be easier for me, because I don't represent him " At the hearing, counsel agreed to, and did, send a letter to Conley advising him that the court was issuing a bench warrant for his appearance at the next hearing date No objection to the court's decision to issue a bench warrant was made. Only after the trial court ruled Conley was entitled to exercise his homestead exemption did Driver's counsel file a motion to reconsider, raising an objection to the issuance of the bench warrant for the first time This point of error was waived. It is also worth noting that issuing a bench warrant is a matter within the discretion of the trial court *See In re Z L.T* , 124 S W 3d 163, 164 (Tex 2003)

Tanner v. McCarthy, 274 S.W.3d 311, 322 (Tex. App. – Houston [1st Dist.] 2008, no pet.).

We review the granting or denial of a turnover order for an abuse of discretion. *Beaumont Bank, N.A v. Buller*, 806 S.W.2d 223, 226 (Tex. 1991); *Tanner*, 274 S.W.3d at 320. A trial court abuses its discretion if it acts in an unreasonable or arbitrary manner. *Downer v. Aquamarine Operators, Inc.*, 701 S.W.2d 238 (Tex. 1985). A trial court's issuance of a turnover order, even if predicated on an erroneous conclusion of law, will not be reversed for an abuse of discretion if the judgment is sustainable for any reason. *Buller*, 806 S.W.2d at 226. A trial court does not abuse its discretion if there is some evidence of a substantive and probative character to support the decision. *Tanner*, 274 S.W.3d at 321-22. Driver's points of error question whether there was "some evidence" supporting the trial court's conclusion that Conley did not "abandon his homestead Property."

All parties agree that the property in question was the homestead of Conley at some point. "Once acquired, homestead rights are not easily lost. Property may lose its homestead character only by the claimant's death, abandonment, or alienation." *Duran v. Henderson*, 71 S.W.3d 833, 842 (Tex. App. – Texarkana 2002, pet. denied). Driver argues that Conley's incarceration constituted an abandonment of his homestead. "Abandonment of a homestead requires both the cessation or discontinuance of use of the property as a homestead, coupled with the intent to permanently abandon the homestead." *Womack v.*

Redden, 846 S.W.2d 5, 7 (Tex. App. – Texarkana 1992, writ denied). Evidence relied on as establishing "abandonment of a homestead must make it undeniably clear that there has been a total abandonment with an intention not to return and claim the exemption." *Id.*

Driver's first argument is that Conley's homestead was abandoned due to his long-term imprisonment. Driver had the burden of proving abandonment with legally and factually sufficient evidence. *Florey*, 212 S.W.3d at 446. Conley was married and divorced several times. The home was purchased as his separate property in 1985. He testified, "I've lived there ever since. I have supported it fully. I have not abandoned it or anything of that type. . . . I have never left my home with the intention of not going back." Records from the appraisal district list the property as Conley's homestead. On advice of counsel, Conley filed for bankruptcy after the civil judgment in Driver's favor. He declared the property as his homestead in that bankruptcy. Conley's responses to discovery establish that his books and records are still kept at his home and that his daughter lived in the home from time to time.[4] Conley testified he planned

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[4] We also note that a major point of contention in this case was Conley's claim that he was common-law married to Marta Moncoda The Constitution currently provides that "[a]n owner or claimant of the property claimed as homestead may not sell or abandon the homestead without the consent of each owner and the spouse of each owner " Tex Const art XVI, § 50(b). Because Conley could make his homestead claim as a single adult, we

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on living in the home on his release from incarceration.

Abandonment of a homestead must be voluntary. *Id.* at 444 (citing *King v. Harter*, 70 Tex. 579, 8 S.W. 308, 309 (1888)). "An act of necessity is not a voluntary abandonment of the homestead." *R.B. Spencer Co. v. Green*, 203 S.W.2d 957, 959 (Tex. Civ. App. – El Paso 1947, no writ). While Conley voluntarily committed the crime, he did not voluntarily change his residence. A homestead is not abandoned merely because a person does not occupy the home during a prison sentence. *Florey*, 212 S.W.3d at 447. We conclude that there was some evidence to support the trial court's finding that Conley's homestead was not abandoned.

Driver did not attempt to contest Conley's claims that he considered the home as homestead and planned to return to it when released from incarceration. Instead, Driver complained that "immediate transfer of [nonexempt] property" to pay legal fees was conducted in bad faith with the design of keeping Driver from collecting on her judgment. We are unsure of how transfer of nonexempt property to pay legal fees could affect Conley's homestead status. The trial court's finding of fact was that nonexempt property was transferred to pay legal fees and was not conducted in bad faith. We will not disturb this

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need not address the issue of whether he was common-law married

finding, which has no bearing on the issue of abandonment of homestead.[5]

Driver next argued that the filing of a "sham bankruptcy" recommended to Conley by counsel, coupled with his assertion that he may have been married according to common law, suggested that Conley "should be stopped from making such an exemption claim."[6] The trial court found, based on Conley's uncontested testimony, that bankruptcy was filed on advice of counsel and that Conley was unsure of the status of his relationship with Moncoda. Again, Driver's contentions and the evidence presented to support them did not establish that Conley abandoned his homestead and voluntarily left without intention to return.

Because there was some evidence supporting the trial court's denial of Driver's motion for turnover, we overrule Driver's remaining points of error.

We affirm the trial court's judgment.

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[5] In any event, "it is well settled that a conveyance of *exempt* property may not be attacked on the ground that it was made in fraud of creditors." *Duran*, 71 S W 3d at 842-43 (emphasis added)

[6] For the first time on appeal, Driver contends Conley has "unclean hands" because "[i]t is unconscionable for a party to claim the benefit of a homestead exemption while using the very home at issue to commit sexual assaults of a minor " This issue was not presented to the trial court, and we need not consider it.

Josh R. Morriss, III

Chief Justice

Date Submitted: July 27, 2010

Date Decided: August 11, 2010

CAUSE NO. 01-0416

JAMES G. CONLEY, SR.	§	IN THE
Plaintiff/Counter Defendant	§	DISTRICT COURT
VS	§	71st JUDICIAL
	§	DISTRICT
GIANNA DRIVER,		
Defendant/Counter-Plaintiff	§	HARRISON COUNTY,
	§	TEXAS

FINDINGS OF FACT AND
CONCLUSIONS OF LAW

(Filed Jan. 4, 2010)

The Court, having rendered a Turnover Order in the above entitled and numbered case, in which testimony was heard on November 5, 2009 and an Order was tendered by counsel for Defendant/Counter-Plaintiff on December 15, 2009 and signed on said date the Court, makes the following findings of fact and conclusions of law in support thereof:

I. FINDINGS OF FACT

1. On March 31, 2003, a Judgment in favor of Defendant/Counter Plaintiff Gianna Driver was signed for Damages of $300,000.00.

2. Defendant/Counter-Plaintiff Gianna Driver attempted to collect the $300,000.00, judgment by Writ of Execution directed against real properties in Harrison County Texas owned by Plaintiff/Counter Defendant James

G. Conley. The Writ of Execution was returned marker "nulla bona" by the Sheriff of Harrison.

3. Defendant/Counter-Plaintiff Driver presented testimony that the properties are not covered by Homestead Exemption and is subject to being levied on by Writ of Execution; based on various theories under the heading of 'Transfer of Assets in Bad Faith after Civil Judgment" to wit:

   - Sale of Non-Exempt Property
   - Misuse of Bankruptcy Code
   - Misrepresentation of Assets Equity Value
   - Attorney Fee Retainers
   - Misnomer used to intentionally cause confusion on home true ownership.
   - Lies about "Common Law Married

4. Defendant/Counter-Plaintiff Gianna Driver, by counsel or any other testimony failed to present any evidence on Attorney Fees.

5. Plaintiff/Counter Defendant James G. Conley, testimony reflected:

   - He is currently being detained on a 35 year sentence in the Texas Department of Criminal Justice Institution Division for a sexual assault conviction relating to the Defendant/Counter-Plaintiff Gianna Driver's. He has served six years of the of the [sic] sentence.

- He exhausted his appellate rights through the Federal Fifth Circuit Court of Appeal and is currently working with the TIN Program and a law college at this time and expect to eventually obtain his freedom.
- He receives retirement benefits and his daughter has power of attorney he pays property taxes and insurance on the homestead property for which the Writ of Execution was sought and the property is designated as his homestead which he plans to return to live in following his belief of a successful termination of his sentence by efforts of the TIN Program.
- The home is currently occupied by a lady friend that he considers to be his Common Law wife although he is not totally clear on the the Texas requirement for a Common Law Marriage.
- He did sell a promissory the proceeds from he paid retainers for legal fees and repairs to his homestead property.
- He filed for Bankruptcy and complied with all the advice of his Bankruptcy Attorney as to the filing and later Dismissal because did not qualify.
- He never attempted to confuse the ownership of his properties on the Tax Records of Harrison County Texas nor has he abandon his homestead Property.

II. CONCLUSION OF LAW

The Court finds based on the testimony that Defendant/Counter-Plaintiff Gianna Driver and her counsel fail to provide any testimony as to Attorney Fees and fail to present testimony which rose beyond mere assumptions and speculations as to the various allegations of her Bad Faith/Civil Fraud Claims. The Court also finds that was no testimony presented that would rise to a level to negate the Plaintiff/Counter Defendant James G. Conley Homestead Claim to the house and associated property located at 24 Circle Road in Harrison County, Texas. The Court further finds that credible testimony was presented that two property tracts owned by Plaintiff/Counter Defendant James G. Conley, did not meet Homestead Exemption for which the Courts Grant's Defendant/Counter-Plaintiff Gianna Driver's, Motion for Turnover.

SIGNED 4 DAY OF January 2010

BY: /s/ William D. Hughey
PRESIDING JUDGE

CAUSE NO. 01-0416

JAMES G. CONLEY, SR.	§	**IN THE DISTRICT**
Plaintiff/Counter-Defendant	§	**COURT**
	§	
VS.	§	**71st JUDICIAL**
	§	**DISTRICT**
GIANNA DRIVER,	§	
Defendant/Counter-Plaintiff	§	**HARRISON**
	§	**COUNTY, TEXAS**

ORDER PARTIALLY GRANTING COUNTER-PLAINTIFF GIANNA DRIVER'S MOTION FOR TURNOVER ORDER

(Filed Dec. 15, 2009)

On November 5, 2009, the Court heard the motion of Counter-Plaintiff Gianna Driver for judicial assistance in the cause referenced above. The Counter-Plaintiff appeared in person and by counsel. James G. Conley, Sr., the Counter-Defendant in this case, appeared on a bench warrant and represented himself. The Court, having considered the evidence, believes the motion should only be partially granted for properties that have been previously admitted by James G. Conley, Sr. to be non-exempt.

The Court further finds that, in addition to designated homestead property, James G. Conley, Sr. owns the following non-mortgaged real properties that are non-exempt:

a. Unimproved lot ($2,000.00 approximate value) described as **0.604 Acres, Lot 14; Block 3, Abstract 300 J Hill, H, Harrison County, State of Texas); and**

c. Unimproved lot ($2,000.00 approximate value) described as **0.573 Acres, Lot 24 Block 1, Abstract 300 J Hill, V. Harrison County, State of Texas**).

Therefore, the Court is of the opinion that partial relief should be granted the following orders made to assist the applicant in obtaining satisfaction of the judgment rendered by this Court on March 31, 2003.

IT IS, THEREFORE, ORDERED that James G. Conley, Sr.:

1. Immediately deliver possession of the non-exempt properties (as outlined above) to the Sheriff of Harrison County, Texas for execution as ordered herein; and

2. Shall refrain from interfering with the execution of these non-exempt properties by encumbering any of the properties.

IT IS FURTHER ORDERED that the Harrison County Sheriff shall take possession of all properties (as outlined above) that are ordered to be delivered to the Sheriff, levy on such properties as under writ of execution *to be sold separately in 2 different consecutive sales*, and, after giving notice of the sales to be held, sell the properties at public auction to the highest bidder for cash on each of the 2 properties, applying the proceeds of each of the 2 sales to

payment of the expenses of the sales and court costs, with the balance paid over to "Gianna Driver and her attorney Stan Springerley" for crediting on the judgment of this court dated March 31, 2003. In so doing, the Sheriff shall perform all duties and procedures as required by the Texas Rules of Civil Procedure for sale under writ of execution.

All relief not expressly granted by this Order is denied.

SIGNED on this 15th day of December, 2009.

/s/ William D. Hughey
HONORABLE JUDGE PRESIDING

APPROVED AS TO FORM ONLY:

/s/ Stan O. Springerley
STAN O. SPRINGERLEY
Attorney for Gianna Driver

JAMES G. CONLEY, SR., Appellant
v.
GIANNA DRIVER, Appellee

No. 06-03-00085-CV

COURT OF APPEALS OF TEXAS, SIXTH DISTRICT, TEXARKANA

175 S.W.3d 882; 2005 Tex. App. LEXIS 8787

October 5, 2005, Submitted
October 25, 2005, Decided

COUNSEL: Hon. Ebb B. Mobley, ATTORNEY at LAW, Longview, TX.

Hon. Stan O. Springerley, ATTORNEY at LAW, Longview, TX.

JUDGES: Before Morriss, C.J., Ross and Carter, JJ. Opinion by Chief Justice Morriss.

OPINION BY: Josh R. Morriss, III

OPINION

The twelve- or thirteen-year-old Gianna Driver thought her stepfather, James G. Conley, Sr., was going to be the father she had never really had. He encouraged her to excel and told her he loved her. But he began initiating sexual contact with her when she was thirteen or fourteen years old, and the sexual abuse continued for approximately three years. Then, after Driver had ended the three years of sexual encounters and had told her mother and others of the sexual abuse by her stepfather, Conley told Driver

that he hated her, that she had ruined his life and his marriage, and that he would do everything in his power to ruin her life, including making copies of videotapes he had surreptitiously made of some of their sexual encounters and sending them to Driver's mother, boyfriend, family, and school.[1]

Instead of fulfilling his threat, Conley sued Driver for defamation. Driver counterclaimed for assault and intentional infliction of emotional distress. Finding for Driver, the jury found that Driver should recover $ 150,000.00 in damages for assault and $ 150,000.00 in damages for intentional infliction of emotional distress. We affirm the judgment because (1) sufficient evidence supports the assault damages, (2) sufficient evidence supports the damages for intentional infliction of emotional distress, and (3) there was no error in awarding damages for both.

(1) Sufficient Evidence Supports the Assault Damages

When reviewing the legal sufficiency of the evidence to support facts found at trial, we will not set aside the judgment if there is any evidence of a probative nature to support it. *Ray v. Farmers' State Bank*, 576 S.W.2d 607, 609, 22 Tex. Sup. Ct. J. 190 (Tex. 1979). An appellate court cannot substitute its

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[1] Driver's school was the Texas Academy of Mathematics and Science (TAMS) in Denton, on the campus of the University of North Texas

own findings of fact for those of the trial court if there is any evidence in the record to sustain the trial court's findings. *Id.*

In reviewing the trial court's findings for factual sufficiency, we consider all the evidence in the record, including any contrary to the trial court's judgment. *Plas-Tex, Inc. v. U.S. Steel Corp.*, 772 S.W.2d 442, 445, 32 Tex. Sup. Ct. J. 329 (Tex. 1989). The trial court's findings may be overturned only if they are so against the great weight and preponderance of the evidence as to be clearly wrong and unjust. *Cain v. Bain*, 709 S.W.2d 175, 176, 29 Tex. Sup. Ct J. 214 (Tex. 1986).

There is no set formula for finding the value that should be awarded for enduring physical pain and mental anguish. The process of awarding damages for amorphous, discretionary injuries such as mental anguish or pain and suffering is inherently difficult because the alleged injury is a subjective, unliquidated, nonpecuniary loss. *Dollison v. Hayes*, 79 S.W.3d 246, 249 (Tex. App. – Texarkana 2002, no pet.). Because personal injury damages are unliquidated and are not capable of measurement by any certain standard, the jury has large discretion in fixing the amount of the award. *SunBridge Healthcare Corp. v. Penny*, 160 S.W.3d 230, 248 (Tex. App. – Texarkana 2005, no pet.) (citing *Texarkana Mem'l Hosp., Inc. v. Murdock*, 946 S.W.2d 836, 841, 40 Tex. Sup. Ct. J. 513 (Tex. 1997)); *Dollison*, 79 S.W.3d at 249; *Phillips Petroleum Co. v. Burkett*, 337 S.W.2d 856 (Tex. Civ. App. – Fort Worth 1960, writ ref'd n.r.e.). The measure of damages is a matter of opinion of the fact-finder,

and courts in most instances have been reluctant to disturb the findings of a trial court or jury on such matters when there is any evidence to support the findings. *George C. Vaughan & Sons v. Dyess*, 323 S.W.2d 261 (Tex. Civ. App. – Texarkana 1959, writ dism'd); *see also Baylor Med. Plaza Servs. Corp v. Kidd*, 834 S.W.2d 69, 78 (Tex. App. – Texarkana 1992, writ denied); *Exxon Corp. v. Roberts*, 724 S.W.2d 863 (Tex. App. – Texarkana 1986, writ ref'd n.r.e.).

Conley's first point of error charges the evidence was legally and factually insufficient to sustain the jury's award of damages for assault.[2] Conley concedes the sufficiency of the evidence to support a finding of assault, and challenges only the sufficiency of the evidence to support the damages for assault. Conley argues that Driver did not present evidence of mental anguish, and thus, there was no evidence to support the jury's award of damages.

Driver gave detailed and copious testimony. Driver testified that the first physical contact which she regarded as inappropriate involved Conley coming up from behind her in the kitchen of their home, hugging her, and rubbing her stomach; his hand

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[2] As part of that argument, Conley complains the trial court's jury charge did not separate the question of damages into "separate elements such as past or future mental anguish, medical expenses, lost income, [and] pain and suffering." Conley did not request any such breakdown in the charge, so he did not preserve the point for our review. Thus, we need not address this *See* TEX. R. CIV. P. 272, 274

gradually going "south" beneath her underwear. She also testified that Conley forced her to engage in sexual intercourse with him, that it was very painful, and that he inserted his finger in her anus. She testified it was common for the two to go to a Sonic restaurant, and on the way for Driver to perform oral sex on Conley. Conley made her engage in sexual contact at least one or two times a month.

There is a significant amount of evidence to support damages for assault. After the first time Conley touched Driver sexually, she felt betrayed and went to her room and cried. As a result, Driver attempted suicide twice – the first time at age thirteen or fourteen, by cutting her wrists, and again around age fifteen, by taking pills. She was distressed when her mother did not believe her about the sexual abuse by Conley. Driver believes her recovery from the sexual abuse will be a lifelong process. Driver testified, "It hurts me to think that my mom is still married to him today." This has affected how Driver relates to men – she is very distrusting and does not believe them. When Driver found that Conley was obtaining or trying to obtain custody of his granddaughters, she could not sleep at night knowing someone else might live through the nightmare she had been through. Though there were times she could not emotionally handle the abuse, she tried not to let that show on the outside. The first time Driver told school counselor, Donna Fleming, about the sexual abuse, Driver was "tearful and upset." There was a "lot of sadness and emotion [and it] seemed to really

hurt" Driver that her mother did not believe her about the allegations of sexual abuse. In later counseling sessions, Driver began to divulge more details and was very upset. Driver said she was extremely upset, felt dirty, did not think she could ever have a normal sex life, and was taking it very hard because she was thinking of marrying her boyfriend. It took eight counseling sessions before Driver started talking about the sexual abuse, because there is "a lot of secrecy involved with incest, a lot of shame." In the counseling session with Driver's parents and Driver, Driver sat between her parents on the couch "like she was trying to make herself real small and invisible and didn't want to be there." Driver exhibited relief when Fleming told her "you can't be around" Conley.

As cited above, there is a tremendous amount of discretion given to the jury on the amount of damages. There is evidence of a probative nature, and thus legally sufficient evidence, to support the jury's award of damages.

While there is evidence to the contrary, Conley's evidence is essentially directed at challenging whether the sexual assault happened at all, not the damages for the assault. There is legally and factually sufficient evidence to support the jury's determination of damages for assault.

(2) Sufficient Evidence Supports the Damages for Intentional Infliction of Emotional Distress

Conley complains the evidence was legally and factually insufficient to support the jury's award of damages for Conley's intentional infliction of emotional distress on Driver. Conley argues that intentional infliction of emotional distress requires a showing that the emotional distress at issue is so severe no reasonable person could be expected to endure it. *See GTE Southwest, Inc. v. Bruce*, 998 S.W.2d 605, 618, 42 Tex. Sup. Ct. J. 907 (Tex. 1999); *see also* RESTATEMENT (SECOND) OF TORTS § 46 (1965). As with the first point of error, Conley concedes the sufficiency of the evidence to establish the tort of intentional infliction of emotional distress.[3] He challenges the amount of damages, which, again, is within the jury's discretion.

Driver testified to nonassaultive behavior by Conley which caused her emotional and psychological harm. She testified that she found a video camera in the hotel room she shared with Conley, that he told her he had videotaped their sexual acts of the night before, and that he specifically told her he did this to

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[3] To recover damages for intentional infliction of emotional distress, a plaintiff must establish that. (1) the defendant acted intentionally or recklessly; (2) the defendant's conduct was extreme and outrageous; (3) the defendant's actions caused the plaintiff emotional distress; and (4) the resulting emotional distress was severe *Standard Fruit & Vegetable Co v Johnson*, 985 S W 2d 62, 65, 42 Tex Sup Ct. J 274 (Tex 1998)

"destroy [her] reputation, [her] future, her marriage and . . . relationships." Conley told Driver that the videotape would be his "ace in the hole" should she report the abuse to her school counselor. Conley blamed Driver for ruining his life and marriage after she reported the history of abuse and said he would do "everything in [his] power to ruin hers." This conduct especially evinces Conley's intent to control or harm his stepdaughter.

Conley told Driver he had videotaped previous sexual encounters, including one where Driver had fluid dripping down her leg. He told her it was because one day they would not have their special relationship, and he wanted to remember. Conley later said he would ruin Driver's reputation by showing the videotape to future boyfriends or husbands; and said he would send it to her school, her current boyfriend and his family, and to her mother. Fleming said that Driver was very upset and very worried that Conley had threatened her with these videotapes, and that Driver wanted help. Driver acted like she expected videotapes to show up at her dormitory any day. Conley threatened to mail them to various people, demonstrating a pattern of trying to control Driver by these threats. Driver was afraid of Conley making good on his threats to expose her and to withhold financial support. Also, when Driver would refuse Conley sex, he would cry and accuse her of not wanting their "special relationship." When she began dating a boy in high school, Conley acted like a jealous boyfriend. There is legally sufficient evidence

to support damages for intentional infliction of emotional distress.

As with the evidence relative to the assault damages, the minimal contrary evidence challenged whether the events occurred, not the damages sustained as a result of his intentional infliction of emotional distress.

There is sufficient evidence, legally and factually, to support the jury's award of damages for intentional infliction of emotional distress.

(3) There Was No Error in Awarding Damages for Both

Conley's third point of error complains the trial court erred in entering judgment for damages for liability on the two causes of action, which he claims were mutually exclusive.

Intentional infliction of emotional distress is a "gap-filler"[4] tort, allowing recovery in the rare instances in

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[4] The Texas Supreme Court has employed the term "gap-filler" in describing intentional infliction of emotional distress, we believe, to indicate that the tort cannot be used as an alternative to some other, more conventional tort which fits the facts but might be subject to some structural impediment *See Creditwatch, Inc v Jackson*, 157 S W.3d 814, 48 Tex Sup Ct J 425 (Tex 2005) (sexual harassment claim barred by limitations; intentional infliction claim not available), *Zeltwanger*, 144 S W 3d 438, 47 Tex. Sup Ct J 981 (sexual harassment damages statutorily limited, intentional infliction claim not available); *Johnson*, 985 S.W.2d at 68 (bystander claim fails due to added

(Continued on following page)

which a defendant intentionally inflicts severe emotional distress in an unusual manner so the victim has no other recognized theory of redress. *Hoffman La-Roche, Inc. v. Zeltwanger*, 144 S.W.3d 438, 47 Tex. Sup. Ct. J. 981 (Tex. 2004). The tort supplements existing forms of recovery and therefore provides a cause of action for egregious conduct that might otherwise go unremedied. *Id.* Intentional infliction of emotional distress is not available as a cause of action unless the actor intended to cause severe emotional distress, or such distress is a primary risk of the conduct. If conduct is intended or primarily likely to produce severe emotional distress, Section 46 of the Restatement of Torts is the applicable theory of recovery, even if the actor's conduct also produces some other harm. *Johnson*, 985 S.W.2d at 68. Properly limited, the tort is not available when the actor "'intends to invade some other legally protected interest,' even if emotional distress results." *Zeltwanger*, 144 S. W. 3d at 447. Even if the evidence of intentional infliction of emotional distress is independent of that necessary to establish another tort claim, the extraneous actions must be "extreme or outrageous as a matter of law." *Id.* "*Except in circumstances bordering on serious criminal acts*," even heinous acts "will rarely have merit as intentional infliction claims." *Jackson*, 157 S.W.3d at 818, 48 Tex. Sup. Ct. J. 425 (emphasis added).

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elements of proof beyond ordinary personal injury claim, intentional infliction claim not available as alternative)

Though Conley's counsel admitted in oral argument that the tort of intentional infliction of emotional distress had been committed, any damages for that tort must be shown to have arisen from the tort, within the framework for that tort as set out by the Texas Supreme Court. We conclude Driver has made such a showing. The evidence of damages detailed above qualifies under the above authority because the evidence supports findings that (a) the damages for intentional infliction of emotional distress came from Conley's actions, which were separate and apart from his assaultive behavior; (b) those separate actions intentionally inflicted emotional distress on Driver or were likely to produce that result in her; and (c) those separate actions were extreme and outrageous as a matter of law, either being or bordering on criminal behavior.[5] Therefore, the damages for intentional

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[5] We conclude that, when Conley videotaped, and when he threatened to disclose the videotapes of, his sexual encounters with Driver, his actions at least bordered on serious criminal acts within the meaning of *Creditwatch*. In a cursory review of the Texas Penal Code, we identify a few criminal acts on which Conley's nonassaultive actions at least bordered. "Sexual Performance by a Child" is committed by inducing a child under eighteen years of age to engage in a sexual performance – including a motion picture that can be exhibited – or by a parent, legal guardian, or custodian consenting to his or her minor child's or ward's sexual performance in Section 43 25(b) *See* TEX PEN CODE ANN § 43 25(b) (Vernon Supp. 2004-2005) It is also committed if the actor "produces" – takes any action to help create – a performance that includes sexual conduct by a child under eighteen years of age in Section 43 25(d) *See* TEX PEN CODE ANN § 43.25(d) (Vernon Supp. 2004-2005) "Possession . of Child Pornography" is committed by knowingly

(Continued on following page)

infliction of emotional distress were recoverable in addition to the damages for assault under the facts of this case.

We affirm the judgment of the trial court.

Josh R. Morriss, III

Chief Justice

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possessing a visual depiction of a child under eighteen engaging in sexual conduct in Section 43 26 *See* TEX PEN. CODE ANN § 43 26 (Vernon 2003) "Improper Photography or Visual Recording" is committed if the actor videotapes another without the other's consent and with the intent to arouse or gratify the sexual desire of any person or if, knowing the videotape's sexual contents, he or she "promotes" it – which includes manufacturing, issuing, providing, mailing, presenting, or publishing it, or offering to do the same in Section 21 15 and Section 43 21(a)(5) *See* TEX PEN CODE ANN § 21 15 (Vernon Supp. 2004-2005); § 43.21(a)(5) (Vernon 2003).

[SEAL]

THE SUPREME COURT OF TEXAS

Orders Pronounced November 12, 2010

ORDERS ON PETITIONS FOR REVIEW

THE FOLLOWING
PETITIONS FOR REVIEW ARE DENIED:

10-0627 LEONARD PHILLIPS v. AMERICAN ELASTOMER PRODUCTS, LLC; from Harris County; 14th district (14-09-00164-CV, 316 SW3d 181, 06-17-10)

10-0717 GIANNA DRIVER v. JAMES G. CONLEY, SR.; from Harrison County; 6th district (06-10-00004-CV, 320 SW3d 516, 08-11-10)

10-0816 LOWELL MERRITT v. TERRY DOUGLAS; from Collin County; 5th district (05-09-00180-CV, ___ SW3d ___, 07-23-10)

ORDERS ON MOTIONS FOR REHEARING

THE MOTION FOR REHEARING OF THE
FOLLOWING PETITION FOR REVIEW IS DENIED:

10-0174 TONY CANTU AND ELSA CANTU v. WADE E. MCKINNEY, JR., REBECCA MCKINNEY, JUSTIN MCKINNEY, DANIEL P. BROUSSARD, CRAIG P. DEHAAN, JONNIE K. HARKER, EPERNAY COMMUNITY ASSOCIATION, INC.; from Harris County; 1st district (01-07-00638-CV, ___ SW3d ___, 11-19-09)

MISCELLANEOUS

THE FOLLOWING DIRECT APPEAL IS DISMISSED:

10-0907 WALTER LEE HALL, JR., IN ALL NECESSARY CAPACITY v. HON. J. DAVID PHILLIPS, PRES. J., COUNTY COURT AT LAW NUMBER 1, IN AND FOR TRAVIS COUNTY, TEXAS, IN BOTH HIS OFFICIAL AND PERSONAL CAPACITIES, ET AL.; from Travis County
expedited motion to stay denied

THE FOLLOWING PETITIONS FOR WRIT OF MANDAMUS ARE DENIED:

10-0902 IN RE CRAIG E. MENDENHALL; from Potter County; 7th district (07-10-00342-CV, ___ SW3d ___, 09-01-10)

10-0918 IN RE LAKEITH AMIR-SHARIF; from Dallas County; 5th district

THE FOLLOWING PETITION FOR WRIT OF MANDAMUS IS DISMISSED:

10-0888 IN RE RABA-KISTNER CONSULTANTS, INC.; from Cameron County; 13th district
motion to dismiss granted
emergency motion for temporary relief dismissed

THE MOTION IN THE FOLLOWING PETITION FOR WRIT OF MANDAMUS IS GRANTED:

10-0272 IN RE ALBERT G. HILL, III AND ERIN HILL; from Dallas County; 5th district (05-10-00447-CV, ___ SW3d ___, 04-21-10)
abatement order issued October 29, 2010, lifted
petition reinstated
unopposed second emergency motion to withdraw granted

REPORTER'S RECORD

VOLUME 1 OF 2

TRIAL COURT CAUSE NO. 01-0416

JAMES G. CONLEY, SR.	*	IN THE
	*	DISTRICT COURT
VS	*	
GIANNA DRIVER	*	HARRISON COUNTY,
	*	TEXAS
	*	
	*	71ST JUDICIAL DISTRICT

MOTION FOR TURNOVER

SEPTEMBER 9, 2009

On the 9th day of September, 2009, the following proceedings came on to be heard in the above-entitled and numbered cause before the HONORABLE WILLIAM T. HUGHEY, Judge Presiding, held in Marshall, Harrison County, Texas:

Proceedings reported by computerized stenotype machine; Reporter's record produced by computer-assisted transcription.

* * *

[19] me – let's work on bench warranting him back, and then we'll set it and everything.

I'll be honest with you, I want you to get something in place that your client will be able to go and collect on.

My gut feeling right now, if this guy is everything that you say he is and everything, I promise you, when you send him notice, a copy of this Court's order, he's going to spring into action, and then lo and behold, we'll be back in here on some type of rehearing, basically, you know, going back to square one with him probably raising some issues as to due process and notice and everything.

I would rather get it right for you and your client the first time around. And it's clear that he's representing himself, the way that it appears and everything, in your exhibits and everything, so let's do it that way.

And – because like I say, I want you to walk out of here with something that – that's valid. And right now I have a question as to whether or not – you know, that would be another thing if he was over in Longview someplace and just decided not to come in, but I would imagine, if you told them he had court today, they would probably have said, "You can come on up to [20] Marshall" and everything.

So I'm going to recess this and see what we can do about getting him bench warranted back, and then I'll get – we'll get in contact with you.

MR. SPRINGERLEY: And just to clarify, Judge, you're going to issue an order that –

THE COURT: Yeah. Yeah. We'll bench warrant him back here.

MR. SPRINGERLEY: And then I'll be able to get a copy of that –

THE COURT: A copy of it, yeah, and –

MR. SPRINGERLEY: – and send it to him?

THE COURT: No. Actually, we'll bench warrant him back here –

MR. SPRINGERLEY: Okay.

THE COURT: – and set this thing for a –

MR. SPRINGERLEY: So there's nothing at this time that I need to –

THE COURT: That you need to do.

MR. SPRINGERLEY: – send to him?

And then it will be set for a hearing?

THE COURT: Yeah. The best thing that you could probably do is send him a letter and let him know that the Court is going to issue a bench warrant

* * *

REPORTER'S RECORD

VOLUME 2 OF 2

TRIAL COURT CAUSE NO. 01-0416

JAMES G. CONLEY, SR.	*	IN THE
	*	DISTRICT COURT
VS	*	
GIANNA DRIVER	*	HARRISON COUNTY,
	*	TEXAS
	*	
	*	71ST JUDICIAL DISTRICT

MOTION FOR TURNOVER

NOVEMBER 5, 2009

On the 5th day of November, 2009, the following proceedings came on to be heard in the above-entitled and numbered cause before the HONORABLE WILLIAM T. HUGHEY, Judge Presiding, held in Marshall, Harrison County, Texas:

Proceedings reported by computerized stenotype machine; Reporter's record produced by computer-assisted transcription.

* * *

[21] please project loud enough so Mrs. McFarland will be able to take your testimony down, okay?

MR. CONLEY: Okay.

THE COURT: All right. And let the record reflect that Mr. Conley has been sworn in by the Court.

And, Counselor, you may proceed.

MR. SPRINGERLEY: Thank you, Your Honor.

JAMES GRADY CONLEY, SR., having been duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. SPRINGERLEY:

Q Sir, would you state your name for the record.

A James Grady Conley.

Q And you've recently had a birthday; is that correct?

A Yes, sir.

Q How old are you?

A 74.

Q Okay. So what year were you born in?

A 10/15/35.

Q 1935. That was during the depression, was it not?

A Yes, it was.

[22] Q And you have been in prison for how long?

A Coming up to six years.

Q So it's been six years since you lived in the house and lot that's at issue here today?

A Since I have lived there, but my family has lived there ever since.

Q What family lives in the home?

A My lady friend and her son and daughter.

Q How are they related to you?

A They're family by association.

Q Are they family by blood?

A No.

Q Are they family by marriage?

A Maybe common-law marriage.

Q You say "maybe." Why do you say "maybe"?

A I don't know what the rules are for common law.

Q Do you believe in polygamy?

A No.

Q So you do not believe that in Texas, you can be married to two people at the same time?

A That's correct.

Q Have you ever looked up your life expectancy?

A No.

Q Do you have any idea what your life [23] expectancy is?

A Well, if I had to guess at it, I would say it's probably equal to my father's.

Q How long did your father live?

A 87.

Q So he was 87 years old?

A Yes.

MR. SPRINGERLEY: May I approach the witness, Your Honor?

THE COURT: Yes.

Q (By Mr. Springerley) Mr Conley, I'm going to hand you a document, and I know that you've indicated that you have difficulty seeing.

A No, I don't have difficulty. I can't – all I see is a white thing that you put in front of me. I have no idea what's on it.

Q Okay. And you've sent letters and responses where you've signed your – you're able to sign documents; is that correct?

A If someone puts my finger down to where they want me to sign it, I can sign it, but I can't see what I sign.

Q Okay. If I told you that –

MR. SPRINGERLEY: If I may approach the bench?

[24] THE COURT: Yes.

Q (By Mr. Springerley) What – what we have here, Mr. Conley, is a U.S. Census Bureau Statistical Abstract.

And if I told you that in 1935, the year of your birth, the expected life expectancy at birth for a male in the United States was 62 years, would you have any reason to contradict that?

A Only that my father was born 20-some years previous to that, and he outlived it.

Q Okay. Other than that, do you – this is just an average.

A Yes. I'm not familiar with the average.

Q Okay. And according to the U.S. Census Bureau, on this expectation of life from birth from 1935, if their statistics show 62 years, do you have any reason to controvert that?

A No.

Q Okay. So do you have any objection to this statistical analysis from the U.S. Census Bureau being admitted into evidence?

A No, except that I don't see how that reflects on my lifetime span.

Q On yours specifically.

A On mine specifically, yes.

[25] Q Okay.

MR. SPRINGERLEY: Your Honor, we would offer this into evidence as Exhibit 1.

THE COURT: Mr. Conley, I will admit it, and I will also take note of the fact that you've already outlived the average, okay?

MR. CONLEY: Yes, sir.

THE COURT: All right.

Q (By Mr. Springerley) So you've actually been quite lucky, have you not? You've done quite well.

A No, because I've taken care of my health. I don't drink. I don't smoke. I don't do any of those things. That's where I get my longevity from.

Q How many years do you have to go on your criminal conviction?

A Depends – well, if I spend full time, it would be 35 years total, but that would be about another 19 years.

Q Well, you've served 6 out of the 35.

A That's correct.

Q So that would 29.

A 29, yeah. Not 19, but 29.

Q Have you exhausted all of your appeals on your criminal conviction?

A I – at this point, I've gone through [26] everything, and I'm involved in the TIN program from one of the law colleges at this time. They've taken my case.

Q At this time, do you have any appeal on your criminal conviction?

A No, just what they're doing.

Q Have you filed appeals before?

A Yes. I've filed appeals, yes.

Q And those appeals, did they fail?

A I have been through the Fifth Circuit.

Q And your conviction has been upheld?

A That's correct.

Q So given that you have 29 years left on your sentence, you're 74, even if you live as long as your father lived, do you believe that you will ever live in the home in Longview, Texas, Harrison County, ever again?

A Yes. I believe I will be in my home within a year or two.

Q And why do you believe a year or two?

A I believe that my conviction will be overturned.

Q Is that –

A I have no doubt about it. No doubt at all.

Q Okay. You also didn't have any doubt that

* * *

[50] MR. SPRINGERLEY: These are Exhibits 6 and 7, which are schedules in the bankruptcy and amended schedules.

THE COURT: Okay.

Q (By Mr. Springerley) Mr. Conley, tell us about the home. Is there a mortgage on the home?

A No.

Q And, in fact, when you filed for bankruptcy, you didn't show any creditor. You didn't have any kind of loan on the home. It was paid off.

A That's correct.

Q The only thing – debt that could possibly be on the home would be property taxes, and you pretty much kept those paid up.

A They're up to date.

Q In your bankruptcy, did you list any other person as having an interest in the home?

A I don't remember.

Q Did you own the home prior to your marriage with Gloria Conley?

A Yes.

Q So it was your separate property; is that correct?

A That's correct.

Q And in your divorce with Gloria Conley, who [51] was awarded the home?

A I kept the home, yes.

Q Did Gloria get any interest in the home?

A No. But I was married before, and my wife that I came down here with, her name is on the title of the home. She had interest in it.

Q Does it show anywhere in your bankruptcy, anywhere at all, that you have a common-law wife?

A At that time, I did not have.

Q In fact, at that time, you were married to Gloria Conley.

A That's correct.

Q And you were married to Gloria Conley until your divorce was filed in 2004; is that correct?

A No.

Q When were you divorced from Gloria Conley?

A June 11, '05.

Q Okay. So it was even later in time.

A That's – that's correct.

Q And the divorce decree was entered somewhere around June of 2005?

A Somewhere.

Q You admit to that fact?

A Yes.

Q So prior to June of 2005, you were not [52] married to more than one person.

A No.

Q You were married to Gloria Conley.

A That's correct.

Q And your bankruptcy documents don't reflect any other spouse or potential spouse at all –

A I hope not.

Q – other than – in fact, you did list Gloria Conley as your wife at the time. Did she join you in the bankruptcy? Did Gloria Conley file bankruptcy with you?

A I don't believe so.

Q Will you stipulate to the fact that you were convicted in the criminal case in December, December 23rd, 2003?

A I don't believe that's correct.

Q When were you convicted?

A December 17th, 2003.

Q Okay. So it was December of 2003.

A 17th, yes.

Q And your testimony is the 17th?

A Yes.

Q So since December 17th of 2003 until the date that you were divorced to Gloria Conley in 2005, did you live with any other woman?

[53] A Yes.

Q While you were incarcerated?

A Well, no, no, not after I was incarcerated. Before I was incarcerated, I did.

Q Okay. When specifically did you live with another woman?

A In '02, the latter part of '02.

Q But that wasn't my question. My question is, from December 17th, 2003, from the time you were convicted going forward until 2005 in June when you were divorced from Gloria Conley, did you live with another woman during that time?

A I was incarcerated, sir.

Q So your testimony is no, you did not live with another woman.

A No. No. I was incarcerated.

Q Mr. Conley, we sent you some interrogatories in aid of judgment.

MR. SPRINGERLEY: May I approach the bench?

THE COURT: Yes.

MR. SPRINGERLEY: And, Your Honor, I had previously tendered the original document to the Court.

Q (By Mr. Springerley) These interrogatories in 5 aid of judgment, on Question 29, you were asked about

* * *

[90] It's not that loose. It's Mr. Conley.

MR. SPRINGERLEY: I apologize, Your Honor.

Mr. Conley has misrepresented facts during multiple legal proceedings. He has misrepresented facts specifically about marital status and property interests. He has done so with an attempt to defraud. Therefore, we believe that he should be estopped from claiming homestead status.

Alternatively, Your Honor, Mr. Conley has treated the home as nonexempt by concocting this story of a common-law wife, and he has made a judicial admission.

He's taken actions to try to protect the home by claiming that he has a family living in the home, but

his own testimony is that he has no minor children; he has no blood relatives; he does not have a wife; he cannot be married to two people at the same time. He's trying to protect the home. This is an attempt to defraud.

This Court should take into account Mr. Conley's unclean hands and his attempts to conceal his assets and acknowledge the equitable elements of estoppel.

Your Honor, the common-law powers of

* * *

REPORTER'S RECORD

VOLUME 1 OF 1

TRIAL COURT CAUSE NO. 01-0416

JAMES G. CONLEY, SR.	*	IN THE
	*	DISTRICT COURT
VS	*	
GIANNA DRIVER	*	HARRISON COUNTY,
	*	TEXAS
	*	
	*	71ST JUDICIAL DISTRICT

MOTION TO RECONSIDER THE COURT'S RULING ON MOTION FOR TURNOVER

DECEMBER 15, 2009

On the 15th day of December, 2009, the following proceedings came on to be heard in the above-entitled and numbered cause before the HONORABLE WILLIAM T. HUGHEY, Judge Presiding, held in Marshall, Harrison County, Texas:

Proceedings reported by computerized stenotype machine; Reporter's record produced by computer-assisted transcription.

* * *

[24] THE COURT: And Counsel –

MR. SPRINGERLEY: Yes, Your Honor.

THE COURT: – just so we're clear on this, obviously, you are here for a number of reasons, the

first one being, when you first tried to execute your judgment, the Sheriff of Harrison County – basically, individuals in law enforcement wouldn't, because they had concern that the homestead exemption applied.

So you've had your hearing on that. This order purports what I basically ordered in the last proceeding. These two lots located here in Harrison County –

MR. SPRINGERLEY: Yes.

THE COURT: – are not exempt, and, hopefully, with this order, the Sheriff should be able to go out and take the necessary steps to execute on the property, sell it, and generate whatever funds can be produced for your client.

And as it relates to the other matter – and I say this in all sincerity – that I asked you for case law that would address the issue of whether or not the homestead exemption was lost if an individual is in prison, and hopefully, the Court of Appeals will let us know, based on this record when it goes there and [25] everything, and in the future, you won't have to stand here, or any other attorney, and address that question, because the answer will there.

Either the Court will say, yea, that it is, or it will say nay, that it's not, and then the next time that a case of this nature comes up, when you send your execution to the constable, to the Sheriff, to execute your judgment, and they come up with the question of "is this homestead," hopefully, there will be case law

that can be tendered to them. Hopefully, they'll read it, and they'll go out and act accordingly and everything.

I wish you the best of luck, and, basically, you're getting the two lots that are covered in this order, possession of those, and get those sold. And I wish the best to you and your client in the future and everything. And I hope this thing works out for you guys, okay?

MR. SPRINGERLEY: Thank you, Your Honor. I do believe it's a case of first impression, and I certainly appreciate the Court's time. I'm very mindful that the Court has spent a lot of time on this, and I do appreciate it.

THE COURT: Okay then. Counsel, let me make sure I get everything back in the file here.

* * *

STATE OF TEXAS

TO THE HONORABLE TOM MCCOOL. SHERIFF OF HARRISON COUNTY TEXAS, GREETINGS:

On this the 21 day of September A.D. 2009, it appearing to the Court that there is now pending on the docket of this Court, a certain case **entitled James G. Conley, Sr. vs. Gianna Driver** being our cause **No. 01-0416**, wherein said defendant is being sued for damages awarded in a judgment in a civil matter now pending before the Court.

WHEREAS, it further appearing to the Court, from a Motion for Turnover Order filed herein by the Counsel for the Defendant, Stan O. Springerly, AND that **JAMES G. CONLEY, SR.** is now confined in the **C.T. TERRELL UNIT – TDCJ-ID, 1300 FM655, ROSHARON, TEXAS 77583** and that therefore a necessity exists for the issuance of a Bench Warrant for said that **JAMES G. CONLEY, SR.** to appear before this Court as a **defendant**.

THEREFORE, it is ordered by the Court that based on the Motion filed by the Counsel for the Plaintiff/Movant the need for the issuance of a Bench Warrant for the said **JAMES G. CONLEY, SR.** be, and is hereby granted, and **THEREFORE,** you the said **TOM MCCOOL** Sheriff of Harrison County, Texas, are hereby directed to call upon the proper authorities of **C. T. TERRELL UNIT AT ROSHARON, TEXAS** for permission to take the body of said that **JAMES G. CONLEY, SR.** and to safely convey him to the County Jail of Harrison

County, Texas, at Marshall, Texas, to answer to the Court as a defendant, and that you safely keep him in said jail until further orders of this Court are made and entered. Due return make of this writ on or before September 30, 2009, showing how you have executed the same.

Given under my official hand and seal of said Court at Marshall, Texas this the 21 day of SEPTEMBER A..D. 2009.

/s/ [Illegible]
Judge 71st Judicial District
Harrison County, Texas

FILED FOR RECORD
HARRISON COUNTY, TEXAS
CLERK DISTRICT COURT

2009 SEP 23 AM 11:32

Cause # 01-0416 SHERRY GRIFFIS

BY /s/ [Illegible]
DEPUTY

OFFICE OF THE DISTRICT JUDGE

Date: 9/21/09

From:
- ☐ Judge
- ☑ Joyce
- ☐ Becky
- ☐ Lynn

To:
- ☑ District Clerk
- ☐ District Attorney
- ☐ Probation
- ☐ Sheriff's Office
- ☐ Other

INSTRUCTIONS

- ☐ Please Sign ASAP
- ☐ Please Place in File
- ☐ Order Unsigned by Judge
- ☐ Hold Until _____
- ☐ Calendar & Remind
- ☐ Set Up File
- ☐ Copy & Mail
- ☐ Please See Me
- ☐ For Your Information
- ☐ Return Original for Judge's Signature

Additional Comments:

Bench Warrant issued on 9/21/09.

Hearing to be set after defendant is returned to Harrison County.

CAUSE NO. 10-0717

ORAL ARGUMENT REQUESTED

IN THE SUPREME COURT OF TEXAS

GIANNA DRIVER,

PETITIONER,

VS.

JAMES G. CONLEY, SR.

RESPONDENT.

On Appeal from the Court of Appeals for the Sixth Appellate District of Texas at Texarkana

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GIANNA DRIVER'S PETITION FOR REVIEW

(Filed Sep. 9, 2010)

STAN O. SPRINGERLEY, ESQ.
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Longview, Texas 75605
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E-mail: stanspringerley@letu.edu
ATTORNEY FOR PETITIONER

ISSUES PRESENTED

ISSUE NUMBER ONE:

Whether or not James G. Conley, Sr.'s criminal actions of sexual assault of his minor stepdaughter constitute an "intentional act" of abandonment of homestead where he knew or should have known that such criminal actions lead to incarceration for a long period of time?

ISSUE NUMBER TWO:

Whether or not the "clean hands" doctrine may be invoked to apply quasi-estoppel or judicial estoppel to Conley's continued claim of homestead exemption?

ISSUE NUMBER THREE:

Whether or not the application of homestead protection by state courts violates the due process and equal protection rights, and the 14th Amendment to the United States Constitution, of sexual assault victims who have been abused in the very home that is now claimed to be exempt by the criminal defendant who has a final criminal conviction arising from the abuse committed?

* * *

Cause No. 06-10-00004-CV

ORAL ARGUMENT REQUESTED

IN THE
SIXTH COURT OF APPEALS
AT TEXARKANA, TEXAS

Gianna Driver,

Appellant,

vs.

James G. Conley, Sr.

Appellee.

On Appeal from the 71st Judicial District Court of Harrison County, Texas

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APPELLANT'S BRIEF

(Filed May 5, 2010)

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ATTORNEY FOR APPELLANT

ISSUES PRESENTED

ISSUE NUMBER ONE:

Did the trial court's actions of: (1) suspending a civil hearing on a Motion for Turnover Order and issuing a bench warrant to allow the State to pay transportation costs, including food and housing, for a convicted inmate; and (2) upholding a finding that the inmate had "homestead" protection unfairly prejudice Gianna Driver in violation of the equal protection and due process clauses of the 14th Amendment to the United States Constitution?

ISSUE NUMBER TWO:

Did James G. Conley, Sr. waive his opposition to the Motion for Turnover Order by failing to timely make arrangements to pay for his transportation costs or to hire counsel to attend the hearing held on September 9, 2009 on his behalf?

ISSUE NUMBER THREE:

Whether or not the evidence pertaining to numerous actions taken by James G. Conley, Sr. that indicate an intent to defraud in this case, including concealment of assets and changed positions with regard to his marital status and marital property interests, support a finding of bad faith and waiver of "homestead" protection?

ISSUE NUMBER FOUR:

Whether or not the "clean hands" doctrine may be invoked to apply quasi-estoppel or judicial estoppel to Conley's claim of homestead exemption?

* * *

CAUSE NO. 01-0416-C

JAMES G. CONLEY, SR.	§	**IN THE**
Plainitiff [sic]/	§	**DISTRICT COURT**
Counter-Defendant,	§	**71st JUDICIAL**
VS.	§	**COURT**
	§	**HARRISON**
GIANNA DRIVER,	§	**COUNTY, TEXAS**
Defendant/	§	
Counter-Plaintiff.	§	

COUNTER-PLAINTIFF GIANNA DRIVER'S MOTION TO RECONSIDER RULING ON MOTION FOR TURNOVER ORDER (HEARING HELD NOVEMBER 5, 2009 AT 10:30 A.M.)

(Filed Nov. 20, 2009)

TO THE HONORABLE JUDGE:

COMES NOW **Gianna Driver**, hereinafter referred to as "Driver," by and through her attorney, Stan O. Springerley, and files this Motion to Reconsider Ruling on Motion for Turnover Order in aid of satisfying a judgment rendered by the court in favor of Driver and against James G. Conley, Sr., hereinafter referred to as "Conley," and as grounds for this motion shows the following:

DRIVER'S FAILURE TO SHOW AN "INTENTIONAL" ACT

I.

During the Court's announcement of its ruling on November 5, 2009, the Court indicated that Driver failed to demonstrate an intentional act by Conley to commit fraud or to abandon his homestead. Driver respectfully asks the Court to reconsider the fact that Conley brutally violated his position of trust and sexually assaulted starting when she was a minor child only 14 years old. Such an intentional act was deemed by a jury judgment affirmed by the 6th Court of Appeals to "border on criminal activity" when that Court upheld this civil judgment. ***Conley v. Driver*, 175 S.W.3d 882 (Tex. App. – Texarkana 2005, pet. denied).** Given the totality of the circumstances, and the fact that Conley is a manipulator that has been criminally convicted, there can be no other conclusion but that Conley's misbehavior in attempting to conceal assets and not being forthright in this civil proceeding is calculated to defraud his *involuntary* "creditor" who is the victim in this case. Additionally, since Mr. Conley has been finally adjudicated in the criminal case, Driver argues that he has given up his legal right to claim any "homestead" protection. Especially in light of the fact that Conley has no spouse or minor children and no legitimate "homestead" use for the property he owns where he no longer resides.

REASON FOR NOT SEEKING A FRAUDULENT TRANSFER ACTION

II.

The Court also stated that Driver could have sought to "invalidate" the sale of the non-exempt building that occurred a mere 1 day after the rendering of the civil judgment in this case. This is incorrect. Conley intentionally filed a sham bankruptcy, which placed an automatic stay from any legal proceedings against him. **11 U.S.C. § 362.** In addition to delaying his bankruptcy dismissal for over a year, Conley also appealed this civil judgment to buy more time. Driver was not in a position to obtain another judgment against Conley on top of the $300,000 judgement she already had, and seeking a fraudulent transfer action against the third-party purchaser was speculative because that person denied any knowledge of Conley's intentions. Therefore, to focus on *Driver's* "failure" to seek a fraudulent transfer action is to place the burden on the wrong party. Driver argues that the wrongdoer here is Conley and the burden should be properly placed on him to explain all of his actions to conceal and/or liquidate assets.

COURT CONSIDERED EACH ACTION TAKEN BY CONLEY INDIVIDUALLY

III.

The Court here ruled that Driver failed to carry her burden of proof on each alleged action taken by Conley, including the outright lie that Conley made

regarding being "common law" married when he had previously admitted in this and other legal proceedings that he was married to Gloria Conley (Driver's mother). However, *the totality of the circumstances* supports the conclusion that Conley is continuing his pattern of lying that he demonstrated during his criminal proceedings. Conley should not be allowed to disregard the rule of law by being permitted to change his story, lie in the discovery process, and claim legal protection of homestead at the same time.

COURT SHOWED CONCERN FOR CONLEY'S DUE PROCESS

IV.

Driver's motion was originally scheduled for September 9, 2009. In fact, the Court took up the motion, and Driver was allowed to enter evidence before the Court recessed the hearing and advised Driver's attorney that it would take the extraordinary step of issuing a bench warrant to allow Conley to appear and defend the motion (even though Conley assumed the risk of representing himself and chose not to hire an attorney). It was only at the rescheduled hearing that Driver's attorney was informed that Conley himself had written a letter to the Court asking for assistance to appear at the hearing. Conley was not entitled to such assistance because courts have held that defendants are not entitled to notice or a hearing regarding a motion for turnover. ***See e.g., Thomas v. Thomas*, 917 S.W.2d 425, 433-34 (Tex. App. – Waco 1996, no writ); *see also, Plaza***

***Court, Ltd. V. West*, 879 S.W.2d 27** [sic], **276 (Tex. App. – Houston [14th Dist.] 1994, no writ).** By placing too much of an emphasis on the rights of the criminal, it appears that an arm of the State has chosen a side and paid for transportation costs and charged Harrison County for the costs of inmate housing in order to protect the interests of a convicted criminal over the interests of a victim.

PRAYER

WHEREFORE, PREMISES CONSIDERED, Counter-Plaintiff Driver prays that the ruling on her Motion For Turnover Order be reconsidered, and that the Court:

1. Order a Sheriff's sale of all of Counter-Defendant Conley's properties owned in Harrison County;
2. Grant such other relief, either at law or in equity, general or special, to which she may be justly entitled.

Respectfully submitted,

/s/ Stan O. Springerley

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ATTORNEY FOR GIANNA DRIVER

CERTIFICATE OF DELIVERY

I, the undersigned, hereby certifies that a copy of the foregoing document was served upon the following parties of interest via Certified First Class U.S. Mail, Return Receipt Requested, to:

James G. Conley, Sr.
#1216006
c/o Sheriff's Office
Harrison County Jail
200 W. Houston St.
Marshall, Texas 75670

DATED: 11/17/2009

/s/ Stan O. Springerley
Stan O. Springerley
Attorney for Gianna Driver

CAUSE NO. 01-0416

JAMES G. CONLEY, SR.	§	**IN THE**
Plaintiff/	§	**DISTRICT COURT**
Counter-Defendant	§	
	§	**71st JUDICIAL**
VS.	§	**COURT**
	§	
GIANNA DRIVER,	§	**HARRISON**
	§	**COUNTY, TEXAS**
Defendant/	§	
Counter-Plaintiff	§	

COUNTER-PLAINTIFF GIANNA DRIVER'S FIRST AMENDED MOTION FOR TURNOVER ORDER

(Filed Sep. 15, 2009)

TO THE HONORABLE JUDGE:

COMES NOW **GIANNA DRIVER**, hereinafter also referred to as "Driver," by and through her attorney, Stan O. Springerley, and applies for an order to aid the satisfaction of a judgment rendered by this Court in favor of Driver and against James G. Conley, Sr., hereinafter also referred to as "Conley," and as grounds for the order shows this Court the following:

THE UNDERLYING JUDGMENT

I.

Driver, as the Counter-Plaintiff in the above styled and numbered cause, was awarded judgment of this Court on **March 31, 2003** against **James G. Conley, Sr.** for damages of **$300,000.00**, together with interest on that amount at the rate paid, and costs of court. The judgment is now final, including appeals made, and the judgment is fully enforceable and due to Driver in the unpaid balance plus interest accruing from and after the date of this motion.

ASSETS OWNED OR CONTROLLED BY CONLEY

II.

Conley owns or controls one or more properties that are non-exempt from attachment, execution, or other seizure for the satisfaction of liabilities. Either expressly under the Texas Property Code or through Conley's prior made statements in other judicial proceedings, or *through Conley's attempts to fraudulently hide or change the characterization of his properties*, these properties are non-exempt from execution under Texas law. These properties, their value, and location are described as follows:

- House and lot[1] ($100,000.00 approximate value) located at and commonly known as **24 Circle Road, Longview, Harrison County, State of Texas 75602-4800 (Legal Description: 0.604 Acres, Lot 7, Block 3, Abstract 300 J Hill, H, Harrison County, State of Texas)**;

- Unimproved lot ($2,000.00 approximate value) described as **0.577 Acres, Lot 12, Block 3, Abstract 300 J Hill, H, Harrison County, State of Texas)**;

- Unimproved lot ($2,000.00 approximate value) described as **0.603 Acres, Lot 13; Block 3, Abstract 300 J Hill, H, Harrison County, State of Texas)**;

- Unimproved lot ($2,000.00 approximate value) described as **0.604 Acres, Lot 14; Block 3, Abstract 300 J Hill, H, Harrison County, State of Texas); and**

- Unimproved lot ($2,000.00 approximate value) described as **0.573 Acres, Lot 24 Block 1, Abstract 300 J Hill, V. Harrison County, State of Texas)**.

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[1] It should be noted that mere ownership alone is insufficient to constitute premises of a homestead. ***Sanchez*, 960 S.W.2d 770; *Silvers v. Welsch*, 127 Tex. 58, 91 S.W.2d 686, 688 (1936)** Furthermore, merely residing in a house over a length of time alone does not convert it to homestead. ***Id***.

The above-referenced House and lot, along with four additional lots, are hereinafter referred to as "The Harrison County Properties."

CONLEY TRANSFERRED ASSETS IN BAD FAITH AFTER THE CIVIL JUDGMENT IN THIS CASE

III.

Immediately after Driver obtained a civil judgment against Conley in this case, Conley moved quickly to avoid paying the judgment and began a pattern of sheltering his assets[2] as follows:

- ***Sale of Non-Exempt Property*** – Conley sold a non-exempt promissory note, which was secured with commercial property located at Hwy 259 in Gregg County, *the day after* Conley had an adverse civil judgment rendered against him. **Exhibits "A-1" (Civil Judgment in this case on March 31, 2003) and "A-2" (Statement of Financial Affairs filed in personal bankruptcy at item 10 "Transfers" showing sale of property on April 1, 2003). Exhibits "A-1" and "A-2" are incorporated herein as**

[2] There is a huge difference between "legal" exemption planning and suspicious asset transfers that are close in time to a civil judgment because such transfers indicate intent to hide assets in "bad faith." **Tex. Bus. & Corn. Code § 24.005(a)(1) (a transfer made is fraudulent if the debtor made the transfer with actual intent to hinder, delay, or defraud any creditor of the debtor).**

if copied in full. Conley took the proceeds of the promissory note and commercial property consisting of $39,088.00 liquid assets and transferred the money when he made payment in the amount of $30,000.00 to various attorneys as retainers for future litigation and allegedly used the remainder balance for "home repairs" in order to hide the funds in his "homestead." **Exhibit "A-3" (Transcript of Rule 2004 Bankruptcy Examination, pg. 11, lines 10-19, December 22, 2003). Exhibit "A-3" is incorporated herein as if copied in full.**

- ***Misuse of Bankruptcy Code for Further Delay*** – Within six (6) short months of the civil judgment, Conley filed for bankruptcy[3] in a blatant attempt to discharge a tort judgment[4] in bad faith. The bankruptcy was filed on August 18, 2003 in the Eastern District of Texas – Marshall Division under

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[3] Of course, Conley's bankruptcy filing made it more difficult for Driver to pursue any "fraudulent transfer" claims because the Bankruptcy Code as it existed at the time contained a "super discharge" allowing a debtor to write-off "civil fraud" so long as a "repayment plan" was filed with the bankruptcy court ***See* former version of 11 U.S.C. § 1325 (prior to October 17, 2005).**

[4] As opposed to a traditional creditor in contract, Driver is an *involuntary* "creditor" who is a victim of sexual assault Driver did not file the civil action against Conley but was dragged into court in a preemptive strike when Conley filed a bogus "defamation" claim, however, Driver counter-sued and had to defend herself while she involuntarily re-lived her sexual assault memories out in the open for the public record

Chapter 13 Case No. 03-20388, and the case was ultimately dismissed for lack of eligibility on July 13, 2004. **Exhibits "B-1" and "B-2" respectively which are incorporated herein as if copied in full.** The Bankruptcy case had numerous factors showing "bad faith" – including the quick filing after the civil judgment, the fact that Driver was essentially the only creditor (and with a large claim), and the fact that Conley proposed a "repayment" plan with a paltry four percent (4%) dividend (or four (4) cents on the dollar). Most telling was the fact that Conley filed the bankruptcy case even though he was above the debt-ceiling for eligibility to file a Chapter 13 case (under 11 U.S.C. § 109). **Exhibit "C" (Transcript of Bankruptcy hearing on Motion to Dismiss, pg. 3, June 8, 2004). Exhibit "C" is incorporated herein as if copied in full.** Finally, it is important to note that case law clearly indicated as early as 1990 that civil claims based on "willful and malicious" injury for assault were not dischargeable in any kind of bankruptcy case. ***In re LeMaire*, 898 F.2d 1346, 1353 (8th Cir. 1990) (finding civil debt for gun shooting not dischargeable in a "reorganization" plan under Chapter 13 bankruptcy).** Nevertheless, Conley proceeded with filing a Chapter 13 case.

- ***Misrepresentation of Assets' Equity Value*** – In his bankruptcy, Conley both undervalued his assets and padded the amount of assets he could claim as "exempt property." In fact, Conley had to amend his schedules to correct

several claims to "exemption." For example, Conley first claimed that all of The Harrison County Properties were his "homestead;" however, he amended his bankruptcy documents to claim only one (1) acre as "homestead." **Exhibit "D-1" (Bankruptcy Schedule C, August 18, 2003) and "D2" (Amended Schedule C, March 24, 2004). Exhibits "D-1" and "D-2" are incorporated herein as if copied in full.**

- ***$30,000.00 For Attorney Fee Retainers*** – Conley paid large retainers to multiple attorneys for his criminal trial,[5] as well as retainers to attorneys for a divorce case,[6] an additional attorney for the civil trial, another attorney to handle the appeal of the civil case,[7] and yet another attorney for his bad-faith bankruptcy. Conley intended to deplete his liquid assets by paying large attorney fees instead of paying the civil judgment, as demonstrated by his admission during his bankruptcy examination that he spent $30,000.00 on retainer fees for various attorneys. **Exhibit "A-3."**

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[5] Even though it should be noted that Conley dismissed his criminal law attorney, Kevin Settle, during the criminal proceedings before this Court. It is yet to be discovered what happened to any refunded retainer fees from Conley's criminal attorney either back to Conley or to members of Conley's family.

[6] For a divorce to Driver's mother

[7] To further delay the payment of the civil judgment

- ***Lies About Being "Common Law Married"*** – Even though his initial testimony on December 22, 2003 was that a "lady friend" named "Marta Moncoda" was "taking care of the home," Conley later changed his assertion that his "lady friend" is now his "common law wife." **Exhibit "A-3" (pg. 21, lines 2-3 (stating that "a lady friend of mine [lives in the home today]")); *see also* Exhibit "E" (Response to Request for Interrogatories in Aid of Judgment, pgs. 5 & 11 (stating that he is "common law married")). Exhibit "E" is incorporated herein as if copied in full.** In his testimony, Conley also referred to the "lady friend" as a "housekeeper." **Exhibit "A-3" (pg. 45, lines 13-21).** This is a shameless attempt to take advantage of the Texas Constitution's grant of "right of survivorship" for a spouse.[8] Conley's assertion is ridiculous because he was married to Driver's mother, Gloria Conley, until after he was incarcerated upon receiving a Criminal Conviction by Jury Verdict of Guilty on December 17, 2003, in this Court (Criminal Case No. 030069X). **Exhibit "F-1" (Showing Conley's Divorce Decree, June 30, 2005) and Exhibit "F-2" (Guilty Verdict, December 23, 2003). Exhibits "F-1" and "F-2" are incorporated herein as if copied in full.** Conley was not "common law married" to any other person because he was

[8] Tex Const. Art XVI, § 15

still married to Gloria Conley when he went to prison. ***Id.***

- ***Misnomer Used to Intentionally Cause Confusion on Home's True Ownership*** – Conley has further intentionally never used the "Sr." portion of his name with regard to The Harrison County Properties, which could mislead others to believe that the properties are actually owned by Conley's son who bares his same name but lives in Ohio. Furthermore, since Conley went to prison, he changed the address of the owner on the properties to that of his son's in Urbana, Ohio. Such actions are a calculated attempt to deceive others into potentially believing that The Harrison County Properties are in fact owned by Conley's son. **Exhibits "G-1" (print out of Harrison CAD records dated November 20, 2003) and Exhibit "G-2" (print out of Harrison CAD records dated January, 26, 2009). Exhibits "G-1" and "G-2" are incorporated herein as if copied in full.**

JUDICIAL ESTOPPEL APPLIES TO CONLEY'S CHANGED POSITIONS WITH REGARD TO THE OWNERSHIP AND EXEMPTION STATUS OF HIS REAL PROPERTIES

IV.

The public record is clear that Conley was *not* married to anyone else other than Driver's mother,

Gloria Conley, until June 30, 2005, and when Conley stated on his interrogatories that he has been "common law married" and "lived with" someone else prior to his incarceration, it was an outright lie. **Exhibit "A-2" (Statement of Financial Affairs filed in personal bankruptcy at item 16 "Spouses" showing Mr. Conley was married to Gloria Conley at time of bankruptcy filing on August 18, 2003);** ***see also*****, Exhibits "G-1" and "G-2."** Even if Conley was living with someone else, he could not have been common law married to her because he was already in a valid marriage. ***Id.*** *Conley's motivation is to protect the home from the civil judgment; therefore the home cannot be considered to be "homestead" in the eyes of the law.* Conley has treated the home as non-exempt property, and he must be judicially estopped from denying that the home is non-exempt. ***See Moore v. Neff*****, 629 S.W.2d 827, 829 (Civ.App. – Houston [14th Dist.] 1982, ref. n.r.e.) (Doctrine of judicial estoppel bars party who successfully maintains position in prior judicial proceeding from afterwards adopting inconsistent position if doing so would result in prejudice to adversary);** ***see also*****, *Miller v. Gann*****, 842 S.W.2d 641 (Tex. 1992) (indicating that judicial estoppel applies to any sworn statement, whether oral or written, made in the course of judicial proceedings).**

In a prior sworn statement, Conley presented the house and lot to be "homestead' that was solely owned by him. **Exhibit "D-1" (Bankruptcy Schedule C,**

August 18, 2003). He then changed the amount of values and the scope of the "homestead exemption" in his prior bankruptcy proceeding. **Exhibit "D-2" (Amended Schedule C, March 24, 2004**). Fast forward to 2006 during post-judgment discovery in this proceeding, and Conley claims that the house/lot has his "common-law" wife of "several years" living in the home. **Exhibit "E" (at interrogatory no. 29)**. This is also in contrast to his prior deposition testimony that the so called "common-law wife" was merely a "lady friend" or a "housekeeper." **Exhibit "A-3" (pg. 21, lines 2-3 referring to "lady friend") and pg. 45, lines 13-21 referring to "housekeeper")**. Conley is lying in order to protect The Harrison County Properties because he does not consider the home to be "exempt." Based on Conley's blatant lies about his alleged common-law wife and the scope of property ownership in the house and lot, Conley must be estopped from making any claim of exemption on the properties. Conley cannot be allowed to claim the protections of the law, while showing total disregard for the rule of law. Essentially, Conley has unclean hands with regard to any claim of exemption on The Harrison County Properties.

CONLEY'S ACTIONS AND STATEMENTS CONSTITUTE A JUDICIAL ADMISSION THAT HIS REAL PROPERTIES ARE NOT EXEMPT

V.

At the very least, Conley has now waived his claim to homestead exemption. He has made a judicial

admission that The Harrison County Properties are not exempt. Key facts include the following:

- that Conley is blatantly lying about an alleged "common-law" wife having an ownership in the home;
- Conley has now not lived at or near the properties for over six (6) years;
- Conley is in bad health and will most likely die in prison since he has 29 years left (about 74%) on his sentence plus he has already reached his life expectancy based on the year of his birth (1935).
- Conley cannot possibly believe he could ever use these properties within the intended meaning of "homestead" based on the facts of this case.

NEED FOR A TURNOVER ORDER

VI.

Driver will show that none of the properties owned or controlled by Conley listed above can be readily attached or levied by ordinary legal process. Driver will show that attempts were made to have a writ of execution issued by the Clerk of this Court and processed by the Sheriff, which specifically identified nonexempt lots by a cover letter with attached exhibits. Nevertheless, the attempted writ of execution was returned marked "nulla bona" by the Sheriff of Harrison County and is on file among the papers in this cause.

REQUEST FOR TURNOVER TO SHERIFF OR ALTERNATIVELY TO RECEIVER

VII.

Driver requests that the Court order Conley to turn over The Harrison County Properties listed above, together with all documents and records related to the properties, to the County Sheriff for sale under writ of execution and application of the proceeds to the satisfaction of Driver's judgment. Such documents should include any copies of deeds, title insurance, contracts for sale of the properties, and surveys of the properties.

Alternatively, Driver asks the court to appoint a disinterested, qualified third person as receiver of The Harrison County Properties and order Conley to turn over the properties and the rights to receive such properties, as well as all documents and records relating to the properties, to the receiver. The Court should authorize and empower the receiver to seize or otherwise take possession and control of all of Conley's rights, titles, and interests in the properties and to apply proceeds from the sale of the properties or the fair market value of the properties once it is obtained and unable to be sold to the satisfaction of the judgment against Conley.

CONLEY'S ACTIONS JUSTIFY AWARD OF ADDITIONAL COSTS AND FEES

VIII.

As a result of Conley's failure and refusal to pay the judgment rendered in this case, Driver has been required to retain the undersigned legal counsel to institute and prosecute this motion. Driver will pay and incur liability to pay the fees for such services. Driver is, therefore, entitled to recover from Conley the sum of *$4,500.00* as a reasonable fee for the unusual and specialized attorney's services rendered and to be rendered in this Court. In the event of an appeal or other proceeding in the court of appeals, Driver would be further entitled to an additional *$6,000.00* as a reasonable attorney's fee; in the event of an appeal or other proceeding in the Texas Supreme Court, Driver would be entitled to an additional *$6,000.00*.

EX PARTE RELIEF APPROPRIATE

IX.

Conley is currently representing himself. **Exhibits "H-1" (Disengagement Letter from Michael B. Fetter, August 26, 2004) and "H-2" (Disengagement Letter from Ebb B. Mobley, June 2, 2006). Exhibits "H-1" and "H-2" are incorporated herein as if copied in full.** Even though Conley is representing himself, he has a duty to abide by the Texas Rules of Civil Procedure by designating an attorney in charge and responding to pleadings

with current contact information. **Tex. R. Civ. P. 8 (Attorney In Charge) and 57 (Signing of Pleadings).** Since this is not a criminal proceeding nor a family law case involving custody rights, there is no obligation for the State to provide transport of Mr. Conley from the Huntsville prison where he now resides.[9] Therefore, ex parte relief is appropriate in this case if Conley fails to either hire an attorney to contest this matter or pays for his own transport costs so that he may continue to represent himself in his case.

PRAYER

WHEREFORE, PREMISES CONSIDERED, Counter-Plaintiff Driver prays that on final hearing hereof, her Motion For Turnover Order be granted, and that after notice and hearing, the Court:

- Order a Sheriffs sale of all of Counter-Defendant Conley's properties owned in Harrison County (which are described in the attached Exhibits "G-1" and "G-2" as The Harrison County Properties;
- If necessary, appoint a qualified person as receiver for the property described in this motion;
- Order Conley to turn over and deliver to the Harrison County Sheriff or the receiver,

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[9] Conley is in prison for the very acts he committed against Counter-Plaintiff Gianna Driver in this case.

without delay, all properties listed in this motion and all documents relating to or evidencing Conley's interest in such properties;

- If necessary, direct and empower the Harrison County Sheriff or the receiver to possess, control, and deal with the property as set out in this motion or otherwise so as to apply the property toward satisfaction of Driver's judgment; and

- Counter-Plaintiff Driver prays that she have her costs of Court herein, that Driver receive reasonable a amount of attorney's fees and costs, and that Driver receive such other and further relief general or special, at law or in equity, to which she may be justly entitled.

Respectfully submitted,

/s/ Stan O. Springerley

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ATTORNEY FOR
COUNTER-PLAINTIFF
GIANNA DRIVER

CERTIFICATE OF DELIVERY

I, the undersigned, hereby certifies that a copy of the foregoing document was served upon the following parties of interest via Certified First Class U.S. Mail, Return Receipt Requested, to:

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#1216006
C.T. Terrell
1300 FM 655
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James G. Conley, Jr.
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Urbana, Ohio 43078-9626

DATED: 09/14/2009

/s/ Stan O. Springerley
Stan O. Springerley
Attorney for Gianna Driver